Supreme Court

New South Wales

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| Case Name: | Mudgee Dolomite & Lime Pty Ltd v Robert Francis Murdoch; In the matter of Mudgee Dolomite & Lime Pty Ltd |
| Medium Neutral Citation: | [2020] NSWSC 1510 |
| Hearing Date(s): | 18-21, 25-28 August 2020; 2 September 2020; 8 September 2020; 11 September 2020; 15-16 September 2020 |
| Decision Date: | 28 October 2020 |
| Jurisdiction: | Equity - Corporations List |
| Before: | Black J |
| Decision: | Certain claims in relation to work done at mine site were established. Plaintiff to have opportunity to elect between account of profits and compensation under s 1317H of the Corporations Act as against Third and Fourth Defendants to Further Amended Statement of Claim. Compensation under s 1317H of the Corporations Act to be ordered against First and Second Defendants where no account of profits was sought. Mudgee Dolomite & Lime Pty Ltd wound up on the just and equitable ground. Several other claims either not established or not necessary to decide. |
| Catchwords: | CORPORATIONS — Directors and officers — Fiduciary duties — Conflict of duty and interest — Conflict of duty and duty — Diversion of corporate opportunity— Whether corporate opportunity within scope of company's activities — Where other companies associated with directors took up profitable work — Where diversion occurred after shareholders intended to split up company — Split up not implemented at time of diversion — Directors' duties where intention or understanding to split up company in future but no |

present implementation

CORPORATIONS — Directors and officers — Fiduciary duties — Fully informed consent — Whether sufficient disclosure to constitute fully informed consent

CORPORATIONS — Directors and officers — Liability for breach of directors' duties — Knowing involvement — Where companies associated with directors were alter egos of the directors

CORPORATIONS — Winding up — Grounds for winding up — Just and equitable ground — Relationship between shareholders and directors irretrievably broken down — One of two directors unwilling to attend board meetings or sign financial statements — Whether less extreme remedy available — Evidence that shareholder cannot afford to buy out the other shareholder's shares — Oppression

EQUITY — Equitable remedies — Account of profits — Whether allowance made for Defendants' skill and effort — Discretionary nature of remedy — Where conduct involved lack of honesty

Legislation Cited:

- Evidence Act 1995 (NSW), ss 136, 140
- Corporations Act 2001 (Cth), ss 180, 181, 182, 183, 461(1)(k), 467 1317H, 1322

Cases Cited:

- Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd (2008) 66 ACSR 325
- Aequitas Ltd v Sparad (No 100) Ltd (formerly Australian European Finance Corp Ltd) (2001) 19 ACLC 1006; [2001] NSWSC 14
- Ancient Order of Foresters In Victoria Friendly Society Ltd v Life Plan Australia Friendly Society Ltd (2018) 360 ALR 1; (2018) 130 ACSR 359; [2018] HCA 43
- Ashrafinia v Ashrafinia [2013] NSWSC 1442
- Asia Pacific Joint Mining v Always Resources Holdings Pty Ltd (2018) 125 ACSR 227; [2018] QCA 048
- Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd [2016] NSWCA 347
- Australian Postal Corp v Lutak (1991) 21 NSWLR 584

- Australian Securities and Investments Commission v Cassimatis (No 8) (2016) 336 ALR 209; [2016] FCA 1023
- Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4) (2007) 160 FCR 35; 62 ACSR 427; [2007] FCA 963
- Australian Securities and Investments Commission v Drake (No 2) (2016) 340 ALR 75; 118 ACSR 189; [2016] FCA 1552
- Australian Securities and Investments Commission v Edwards (No 3) (2006) 57 ACSR 209; [2006] NSWSC 376
- Australian Securities and Investments Commission v Flugge (2016) 342 ALR 1; [2016] VSC 779
- Australian Securities and Investments Commission v Healey (No 2) (2011) 85 ACSR 654; [2011] FCA 1003
- Australian Securities and Investments commission v King [2020] 94 ALJR 293; [2020] HCA 4
- Australian Securities and Investments Commission v MacDonald (No 12) (2009) 259 ALR 116; [2009] NSWSC 714
- Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9) [2012] NSWSC 984
- Bhullar v Bhullar [2003] BCC 711; [2003] EWCA Civ 424
- Birtchnell v Equity Trustees Executors and Agency Co Ltd (1929) 42 CLR 384; [1929] ALR 273; [1929] HCA 24
- Boardman v Phipps [1967] 2 AC 46; [1967] 3 WLR 1009
- Breen v Williams (1996) 186 CLR 71
- Briginshaw v Briginshaw (1938) 60 CLR 336
- Calvo v Sweeney [2009] NSWSC 719
- Cassimatis v Australian Securities and Investments Commission (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52
- CellOS Software Ltd v Huber (2020) 144 ACSR 267; [2020] FCA 505
- Chae v Pure Nature Sydney Pty Ltd [2018] NSWSC 914
- Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36
- Chickabo Pty Ltd v Zpher Pty Ltd (2019) 57 VR 406; [2019] VSC 73

- Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; 312 ALR 356; [2014] HCA 32
- Coope v LCM Litigation Fund Pty Ltd (2016) 333 ALR 524; [2016] NSWCA 37
- Daly v The Sydney Stock Exchange Ltd (1985) 160 CLR 371
- Daniels v Anderson (1995) 37 NSWLR 438
- Digital Pulse Pty Ltd v Harris (2002) 40 ACSR 487; [2002] NSWSC 33
- Duncan v Independent Commission Against Corruption [2016] NSWCA 143
- EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3) [2013] WASC 183
- Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd (1999) 161 ALR 599
- Farah Constructions Pty Ltd v Say-De Pty Ltd (2007) 230 CLR 89
- Fox v Percy (2003) 214 CLR 118 at 129; [2003] HCA 22
- Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672; [2001] NSWCA 97
- Great Southern Finance Pty Ltd (in liq) v Rhodes [2014] WASC 431
- Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd (1996) 39 NSWLR 143
- Green v Bestobell Industries Pty Ltd [1982] WAR 1; (1982) 1 ACLC 1
- Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; 287 ALR 22; 87 ACSR 260; [2012] FCAFC 6
- Guinness Plc v Saunders [1990] 2 AC 663
- Gunasegaram v Blue Visions Management Pty Ltd [2018] NSWCA 179
- Hancock Family Memorial Foundation Ltd v Porteous [2000] 22 WAR 198
- Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298; 197 ALR 626; 44 ACSR 390; [2003] NSWCA 10
- Hart Security Australia Pty Ltd v Boucousis [2016] NSWCA 307
- Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd (2011) 86 ACSR 393; [2011] FCA 1154
- Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64

- Howard v Commissioner of Taxation (2014) 309 ALR 1; [2014] HCA 21
- Industrial Development Consultants Pty Ltd v Cooley [1972] 1 WLR 443
- Joint v Stephens (2007) 62 ACSR 309; [2007] VSC 145
- Keech v Sandford (1726) Sel Cas T King 61
- Links Golf Tasmania Pty Ltd v Sattler (2012) 213 FCR 1; (2012) 292 ALR 382; (2012) 90 ACSR 288; [2012] FCA 634
- Maguire v Makaronis (1997) 188 CLR 449
- Moratic Pty Ltd v Gordon [2007] NSWSC 5
- Morley v Australian Securities and Investments Commission (2010) 274 ALR 205; [2010] NSWCA 331
- Nassar v Innovative Precasters Group Pty Ltd (2009) 71 ACSR 343; [2009] NSWSC 342
- Natural Extracts Pty Ltd v Stotter (1997) 24 ACSR 110
- Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170
- Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd (2011) 285 ALR 63; 86 ACSR 674; [2011] FCAFC 166
- One.Tel Ltd (in liq) v Rich [2005] NSWSC 226; (2005) 190 FLR 443; 53 ACSR 623
- Peninsular and Oriental Steam Navigation Co v Johnson [1938] 60 CLR 189; [1938] HCA 16
- Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165
- Primacy Underwriting Agency Pty Ltd v Kilborn [2007] NSWSC 158; (2007) 25 ACLC 160
- Queensland Mines Ltd v Hudson (1978) 18 ALR 1
- Re AJ Roberts Removals and Storage Pty Ltd [2017] NSWSC 1054
- Re Amazon Pest Control Pty Ltd [2012] NSWSC 1568
- Re Central Management (NSW) Pty Ltd [2017] NSWSC 1258
- Re Colorado Products Pty Ltd (in prov liq) (2014) 101 ACSR 233; [2014] NSWSC 789
- Re FAL Healthy Beverages Pty Ltd [2017] NSWSC 476
- Re Hillsea Pty Limited [2019] NSWSC 1152
- Re Pure Nature Sydney Pty Ltd [2018] NSWSC 914
- Re Swan Services Pty Limited (in liq) [2016] NSWSC 1724

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| | - Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134<br>- Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603; [2007] NSWCA 65<br>- Schmidt v AHRKalimpa Pty Ltd [2020] VSCA 193<br>- SEA Food International Pty Ltd v Lam (1998) 16 ACLC 552<br>- Shafron v Australian Securities and Investments Commission (2012) 286 ALR 612; 88 ACSR 126; [2012] HCA 18<br>- Spellson v George (1992) 26 NSWLR 666<br>- Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291; 82 ACSR 1; [2011] WASCA 17<br>- Taxa Australia Pty Ltd v G Wang (2018) 130 ACSR 531; [2018] NSWSC 1412<br>- Twigg v Twigg (No 4); Lambert v Twigg Investments Pty Ltd (No 3) [2020] NSWSC 1159<br>- Vadori v AAV Plumbing (2010) 77 ACSR 616; [2010] NSWSC 274<br>- Vanguard Financial Planners Pty Ltd v Ale [2018] NSWSC 314<br>- V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd (2013) 296 ALR 418; 93 ACSR 76; [2013] FCAFC 1<br>- Vrisakis v Australian Securities Commission (1993) 9 WAR 395 at 450; 11 ACSR 162<br>- Waltons Stores (Interstate) Ltd v Maher (1998) 164 CLR 387<br>- Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18 |
| Texts Cited: | - R P Austin, “Fiduciary Accountability for Business Opportunities” in P D Finn, Equity and Commercial Relationships, Lawbook Co, 1987 |
| Category: | Principal judgment |
| Parties: | Proceedings 2016/84283<br>Mudgee Dolomite & Lime Pty Limited (Plaintiff)<br>Robert Francis Murdoch (First Defendant)<br>Stephen Murdoch (Second Defendant)<br>RK Murdoch Pty Limited (an Australian company) (Third Defendant)<br>Tilecote Farm Pty Limited (formerly known as Bright Pear Pty Limited) (Fourth Defendant)<br>Kurdeez Minerals Pty Limited (Fifth Defendant) |

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| | Proceedings 2016/271516<br>Robert Francis Murdoch (Plaintiff)<br>Mudgee Dolomite & Lime Pty Limited (Defendant)<br><br>Proceedings 2016/355621<br>Brian Murdoch (Plaintiff)<br>Mudgee Dolomite & Lime Pty Ltd (First Defendant)<br>Robert Francis Murdoch (Second Defendant)<br><br>Proceedings 2017/377222<br>Robert Murdoch (First Plaintiff)<br>Stephen Murdoch (Second Plaintiff)<br>Mudgee Dolomite & Lime Pty Ltd (Third Plaintiff)<br>WJ Murdoch Pty Limited (Fourth Plaintiff)<br>Mudgee Stone Co Pty Ltd (Fifth Plaintiff)<br>Brian William Murdoch (First Defendant)<br>B Murdoch Pty Ltd (Second Defendant)<br>Scott Murdoch (Third Defendant)<br>Stoneco Pty Ltd (Fourth Defendant) |
| Representation: | Counsel:<br>V Bedrossian/M Jaireth (Brian Murdoch Interests)<br>J Kelly QC/H K Insall SC/Dr C Mantziaris (Robert Murdoch Interests)<br><br>Solicitors:<br>McPhee Kelshaw (Brian Murdoch Interests)<br>Hills Solicitors (Robert Murdoch Interests) |
| File Number(s): | 2016/84283; 2016/271516; 2016/355621; 2017/377222 |

# JUDGMENT

## Introduction

1 This judgment deals with four overlapping proceedings which were heard together. I will first outline the result that I have reached, by the application of well-established principles to facts as to which there was ultimately little controversy, before turning to a more detailed analysis of the parties' claims, the evidence, the case law and the same outcome that follows from a more extended analysis. I will seek to focus on the issues that are necessary to decide the case.

2 I should first identify several parties to the proceedings. Mr Brian Murdoch (to whom I will refer, with no disrespect, as "Brian") and Mr Robert Murdoch (to whom I will refer, with no disrespect, as "Robert") are brothers and are the two directors of and equal shareholders in Mudgee Dolomite & Lime Pty Ltd ("MDL") and other family companies. Mr Scott Murdoch (to whom I will refer, without disrespect, as "Scott") is Brian's son; he has not done work for MDL for some years although he continued to be paid by it until 2015; and he is a director and shareholder of Stoneco Pty Ltd ("Stoneco"). Mr Stephen Murdoch (to whom I will refer, with no disrespect, as "Stephen") is Robert's son and was, at least from 2009 to 14 March 2014, employed as Production Manager at MDL. RK Murdoch Pty Limited ("RKM") and Tilecote Farm Pty Limited (formerly known as Bright Pear Pty Limited) ("BPPL") are companies associated with Robert and Stephen respectively, and Robert is also a director of RKM. Stephen was also the sole director and shareholder of BPPL; he is and was since at least 18 August 2010 a director of RKM and, since at least 29 June 2012, a shareholder of RKM; he is and was, at all material times, a director of RK Murdoch (NZ) Pty Ltd ("RKMNZ"); and he is and was a director and shareholder of Kurdeez Minerals Pty Limited ("Kurdeez Minerals"). I will refer to Robert, Stephen, RKM and BPPL together as the "Robert Murdoch Interests", and to MDL, WJ Murdoch Pty Ltd ("WJM") and Stoneco together as the "Murdoch Group".

3 First, Brian brings a derivative claim against Robert, Stephen, RKM and BPPL. The first aspect of that claim relates to revenue derived by RKM and BPPL from the Cadia mine. This claim succeeds since I find below that Robert, in breach of statutory and fiduciary duties, made a series of decisions in conflict of duty and interest and duty and duty which deprived MDL of the opportunity to undertake substantial work at the Cadia mine and delivered substantial profits to RKM and BPPL, and Stephen was knowingly involved in those breaches and RKM and BPPL are liable as Robert's and Stephen's alter egos in respect of those breaches of duty. It is no answer to that claim that MDL did not then have sufficient equipment to carry out that work, not least because (adopting an approach recognised at least since *Keech v Sandford* (1726) Sel Cas T King 61), the Court should not neglect the reality that Robert might well

have made greater efforts to buy, lease or borrow the necessary equipment for MDL, if he was not affected by conflicts of duty and interest and the opportunity of profit for RKM and BPPL. MDL is entitled to compensation (although it has not established that it has suffered any loss) or an account of profits, at its election, and the circumstances of this breach do not warrant any allowance for effort by Robert, Stephen, RKM or BPPL beyond the deduction of actual costs incurred which has already been reflected in determining the relevant profits made by RKM and BPPL from the work at the Cadia mine.

4 The second aspect of this claim relates to a mine situated at Timboon, Victoria. This claim fails because the business of MDL and associated companies had been conducted, for a considerable time, on the basis that Brian, Robert and their sons could and did acquire quarries outside MDL, and the opportunity to acquire the Timboon quarry did not come to Robert or Stephen in any capacity associated with MDL. The acquisition of this mine was not within the scope of the duties owed by Robert and Stephen to MDL.

5 Second, Robert and Stephen caused MDL and two other companies within the Murdoch Group to bring a derivative action against Brian, Scott and their associated companies ("Brian Murdoch Interests") in respect of the acquisition of other quarries by Scott and Stoneco and other matters. The Brian Murdoch Interests made a conditional concession that that claim would succeed against Scott and that company, if their claim against the Robert Murdoch Interests in respect of the Timboon quarry succeeded. That claim did not succeed and that condition is not satisfied. This claim fails so far as the Robert Murdoch Interests seek to establish a wider partnership and joint venture, and then show its termination in November 2009 when a separation of the parties' business interests was discussed, broadly agreed without any identification of how it would be implemented, and then not implemented. This claim also fails, so far as it turns upon a fiduciary duty arising from the pleaded partnership or joint venture, which was not established, and an allegation that Scott owed statutory duties as an "officer" to the relevant companies.

6 Brian also brings an oppression claim which relies on the matters on which the Brian Murdoch Interests relied in the first derivative claim and other claims.

Although oppression would likely have been established, at least on the basis of the conduct in respect of the Cadia mine, the Brian Murdoch Interests no longer press their claim for an order that Robert sell his shares in MDL to Brian, where Brian accepted in cross-examination that he cannot afford to buy those shares, and accepted that a winding up (which is also sought by Robert) is the appropriate relief. Robert in turn brings a winding up claim in respect of MDL. This claim succeeds on the just and equitable ground, where MDL was a closely held family company and the relationship between Robert and Brian, its directors and shareholders, and indeed their respective sons, has irretrievably broken down.

**Affidavit evidence and credit**

7 Before turning to the affidavit evidence on which the parties rely, I should address the principles to which the Court should have regard in assessing the affidavit and oral evidence. Given the passage of time between the events and the hearing, I have placed primary emphasis on the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence: *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599 at [15]; *Fox v Percy* (2003) 214 CLR 118 at 129; [2003] HCA 22; *Re Hillsea Pty Limited* [2019] NSWSC 1152 at [16]ff. I also have regard to the fact that the allegations of breach of statutory directors duties which the Brian Murdoch Interests and the Robert Murdoch Interests have each made against the other raise serious matters, in determining whether those matters are proved to the civil standard under s 140 of the *Evidence Act*, reflecting the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; see also *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171. I note that some of the matters to which the parties' affidavits refer are peripheral, although illustrative of the extent of the dispute and ill-feeling which now exist between Brian and Scott on the one hand and Robert and Stephen on the other.

8 The Brian Murdoch Interests relied on several affidavits of Brian, and he was cross-examined at some length. In his first affidavit dated 6 July 2017, Brian referred to the origins of the Murdoch Group business and to his background and work experience. He left school without completing secondary education

and he had no formal education after that time, but he has worked in the operations area within the Murdoch Group's businesses throughout his career, and he obviously has extensive experience in quarrying. It is common ground that the management of the offices and finances of the Murdoch Group were Robert's rather than Brian's responsibility, and I refer to Robert's evidence in that regard below. Brian addresses the purchase of assets from Industrial Minerals Australia Pty Ltd ("IMA") in about 1996/1997, a matter that is also addressed in Robert's evidence. Brian also refers to the circumstances in which the acquisition of assets from IMA was financed, which is also addressed in Robert's evidence, although I do not need to determine the disputes about it in order to determine these proceedings. Brian also refers to the diversification of the Murdoch Group's business, its previous involvement in another business called Hi Tech Concrete with two other persons, and the range of assets owned by MDL, including the Buckaroo quarry site acquired from IMA near Mudgee at which a dolomite quarry is operated, other land on which its processing plant and office complex are located, and other property and assets. Brian also referred, in this affidavit, to financial assistance that he had provided to Scott (Brian 6.7.17 [135]), and addressed equipment owned by MDL and the use of the "MDL" name. I will address other aspects of Brian's evidence in respect of specific issues below.

9 In his second affidavit dated 28 March 2018, Brian gave evidence that he had a first stroke on 22 June 2015 and a second stroke in July 2015 and that his memory is now worse because of the stroke, that sometimes a memory will come to him after "a little while", and that "struggling to recall details that are not immediately able to be recalled is frustrating and tiring". His evidence is that he had had Robert's first affidavit read to him and he had reviewed many of its exhibits but not all of them, and he there responds to that affidavit. Brian also there responds to Stephen's affidavit dated 20 November 2017, to Ms Sullivan's affidavit dated 20 November 2017; and to other affidavits of Ms Murkins dated 19 November 2017; Ms Austin dated 17 November 2017; Mr Streeter sworn 27 October 2017; Mr Kemp dated 27 October 2017; Mr Boag dated 9 November 2017 and Mr Goodwin dated 26 October 2017. I will address aspects of Brian's evidence in this affidavit in respect of specific issues

below. By a third affidavit dated 15 June 2018, Brian responded to Robert's further affidavit dated 2 May 2018. The matters addressed in that affidavit are not material to a determination of the proceedings.

10 In closing submissions, Mr Kelly, who appears with Mr Insall and Dr Mantziaris for the Robert Murdoch Interests submitted, and I accept, that it is likely that Brian was affected by some cognitive difficulties and also some eyesight difficulties in cross-examination, and his evidence was at times lucid and at times confused. Mr Kelly accepted that Brian's understanding of financial concepts and technology was limited, at least at the time of his cross-examination, although Mr Kelly also points to some evidence that suggests that Brian may have had an understanding of basic accounting information at the time of the events in issue and before his strokes.

11 Brian's cross-examination was conducted in short periods, with intervening breaks, to accommodate health concerns, but there were still real difficulties in testing his evidence by cross-examination since, as I noted above, he has had at least a two strokes and he was not able to read, or comprehend, many documents put before him in cross-examination. I accept that difficulty was genuine and that Brian gave evidence honestly and to the best of his recollection, but it is plain that at least some aspects of his recollection of events are now poor. For example, Brian was not sure whether it was the case that he had declined to sign financial statements for MDL since 2014 and could not remember which financial statements he last signed, and he observed that his wife handles those matters and tells him when such a document has arrived (T100). Brian did not appear to have a clear understanding of the matters in issue in the proceedings, and I will refer below to difficulties which emerged in that respect, particularly in respect of the relief that he sought in his oppression case.

12 There were times that Brian either did not understand a question or was significantly mistaken in the timing of events. For example, he gave evidence, in the present tense, that he fixes the machinery and does the welding every day for MDL (T107), although then seeming to recognise that he had not done so for six years since his stroke (T108). There were other points in his cross-

examination when Brian appeared to be mistaken as to uncontentious issues, including whether Scott was involved with the purchase of the Timor quarry in the Hunter Valley through Stoneco (T111). At points in his cross-examination, he indicated, even in response to relatively straightforward questions, that the questions and "this paperwork total confuse" him (T114). He did not recall having received documents relating to the proposed split of assets in MDL (T119) although there is little doubt that he had received them.

13 The Brian Murdoch Interests also rely on Scott's first affidavit dated 6 July 2017, where Scott refers, inter alia, to his work history which involved several periods working outside and then inside the Murdoch Group business and addressed other issues to which I return below. In his second affidavit dated 29 March 2018, Scott responds to Robert's and Stephen's affidavits dated 20 November 2017. He there addresses disputes as to many issues, many of which need not be resolved to determine these proceedings. That affidavit also addresses aspects of tensions between Stephen and Scott, which also evidence the breakdown of relationships between family members. Scott also responds to aspects of Stephen's criticisms of Scott's work in the Murdoch Group business and it is not necessary to determine the merit of those criticisms or Scott's response to them, beyond noting that they again demonstrate the breakdown of relationships within the family. Scott also responds to aspects of Ms Murkins' affidavit dated 19 November 2017 and Mr Kemp's affidavit dated 27 October 2017, both dealing with matters which are not material to the determination of the proceedings. I deal below with other matters addressed by Scott's affidavits in respect of the chronology of events and specific issues.

14 In closing submissions, Mr Kelly criticised Scott's use of terms such as "diverting funds" and "disclosure" of opportunities and his reference to events that were not in MDL's "best interest" in the course of his cross-examination (T140, 146, 150). It seems to me that it is not surprising, or a matter for criticism, that Scott understands events in those terms given the issues which have arisen in these proceedings and the length of time with which the parties have been involved with the proceedings. Mr Kelly submits, and I accept, that it is likely that Scott's evidence was influenced by a degree of "rivalry", for want of

a better word, with Stephen and previous conflicts with Robert in respect of the management of MDL.

15 The Brian Murdoch Interests also rely on the affidavit dated 6 July 2017 of Mr Erwin Bouverie, who was the sole director of Kurdeez Lime Pty Ltd ("Kurdeez Lime") which conducted the Timboon quarry business, before that company and Victorian Agricultural Lime Pty Ltd ("VAL") which owned the land at Timboon were placed in voluntary administration. I will refer to his evidence in relation to the acquisition of the Timboon quarry in dealing with that issue below.

16 The Robert Murdoch Interests rely on a lengthy affidavit of Robert dated 20 November 2017, of some 150 pages and 1,055 paragraphs, which canvasses many matters that have limited relevance to the proceedings, other than to indicate the adverse view that he now takes of Brian and Scott. Significant parts of that affidavit were not admissible and were not read; some parts of it was objected to and not admitted; and more of it was not admissible and would not have been admitted had it been objected to. Robert there refers, at length, to the history of the Murdoch Group and the family business, and refers to the circumstances of the acquisition of IMA to which I refer below.

17 Robert's evidence in his first affidavit (Robert 20.11.17 [71]) is that, shortly after the acquisition of the business of Industrial Minerals Australia Pty Ltd ("IMA") by MDL, he took over the role of General Manager of the Murdoch Group, although it appears there was no meeting or discussion as to that matter, and Brian assumed the role of Operations Manager and Productions Manager. Robert refers (Robert 20.11.17 [73]) to his perception, emphasised throughout his evidence, that the breadth and scope of his involvement in the business was greater and broader than Brian's involvement in the business and he sets out, at length, his contributions to the business, and also indicates his perception that Brian's role "was restricted to operations at the different quarries where he was not required to make any major or strategic decisions affecting any of the companies" and that Brian "did not contribute to bringing business opportunities forward nor did he have ideas for the development of the business or its direction" (Robert 20.11.17 [87]). It seems to me that

Robert's belief that he has been the primary contributor to the success of the Murdoch Group, and that Brian has made a limited contribution to the Group, provides at least part of the explanation for his and Stephen's later willingness to divert revenue to RKM and BPPL, once the prospect of a separation of Murdoch Group emerged. Robert also gives evidence, to similar effect, that he was responsible for "deciding and driving the strategic direction of the company" and of his lack of recollection that Brian made suggestions in respect of business opportunities for MDL or the Murdoch Group (Robert 20.11.17 [90]). His evidence is that it was nonetheless common practice for Brian and him to have discussions regarding the business activities of the Murdoch Group, although these meetings became less regular as a result of Robert's cancer treatment in 2010 and 2011 (Robert 20.11.17 [93]).

18 Robert's evidence is also that he and Brian undertook activities outside the Murdoch Group, through personal partnerships or partnerships through RKM and B Murdoch Pty Ltd ("BMPL") (a company associated with Brian), including their acquisition of an interest in Hi-Tech Concrete and, later, in 2006 and 2007, their involvement in residential subdivisions and other investments (Robert 20.11.17 [109]-[111]). Robert also refers to the circumstances in which Stephen and Scott were introduced as shareholders in another company in the Murdoch Group, Mudgee Stone Co Pty Ltd ("MSC"), without making any financial contribution to the acquisition of an interest in MSC or the Oberon quarry which it operated (Robert 20.11.17 [112]ff), and he also refers to Scott's and Stephen's involvement in the business and to Stephen's incorporation of BPPL in 2003 and Complete Crushing Services Pty Ltd ("CCS"), which now conducts a mobile crushing business, in 2014, after Stephen had resigned from MDL. Robert also refers to the range of rock types and products lines for the main Murdoch Group quarries (Robert 20.11.17 [119]), in evidence that I address below, and to the movement of equipment between companies within the Murdoch Group (Robert 20.11.17 [120]ff). Robert also refers to Brian's involvement in property subdivision from 2006 (Robert 20.11.17 [151]ff).

19 Robert's evidence also addresses, at length, his dissatisfaction with aspects of Scott's work in the Murdoch Group dating back to 2008 (Robert 20.11.17 [199]ff). His evidence as to those matters seems to me to have little relevance

to the proceedings, other than again to emphasise the breakdown of relationship between the parties. Robert also addresses the circumstances in which Scott purchased a mobile crusher outside the Murdoch Group in about July 2009 (Robert 20.11.17 [209]), to which I refer below. Robert addresses, at substantial length, a number of other aspects of the disputes between the parties, in a manner that again demonstrates the breakdown of their relationship. Robert also responds at length to Brian's and Scott's affidavits sworn 6 July 2017, addressing substantially the same topics that are addressed in his evidence in chief in that affidavit. Again, it is not necessary to address many of these matters to determine the issues in these proceedings.

20 By a further affidavit dated 2 May 2018 Robert addressed issues arising in the second derivative proceedings including the sublease of and later the acquisition by Stoneco of the Braeside and Robertson's Knob quarry and the circumstances in which Brian and Robert personally acquired an interest in the Bylong quarry. I will address other aspects of Robert's evidence in these affidavits in dealing with specific issues below.

21 Robert's evidence in cross-examination was characterised by his confidence in the rightness of his cause, even when dealing with conduct that involved plain conflicts between his duties owed to MDL and his personal interests or the interests of the companies with which he and Stephen were associated, RKM and BPPL. That evidence was largely consistent with his evidence in chief, although there are areas of contradiction, for example, whether a jaw crusher purchased for MDL in the United Kingdom in April 2010 was specifically purchased so that MDL could perform work at the Cadia mine (T280).

22 Robert was cross-examined, inter alia, as to his and Stephen's roles in the management of MDL. While Robert's affidavit evidence was that he made decisions about the deployment of plant and machinery, his evidence in cross-examination was that others were involved, at least in the sense that they could ask for plant and equipment, and it seemed to me likely that Robert or Stephen made a decision whether that request would be met. Robert also accepted in cross-examination that Brian did not make major or strategic decisions affecting the companies, although his position was that he did not make such

decisions on his own, at least in the sense that Brian was informed of them (T250). Robert accepted in cross-examination that, from 2009 to March 2014, he and Stephen together formed the senior management team for MDL (T252). Robert also accepted in cross-examination that Stephen was, from 2009 to early 2014, the most senior MDL employee on site at the Cadia mine (T250), although he was not on site for the whole of that period. I think it likely that Robert did understand, as he contended in cross-examination (T273), that either the discussions as to the potential split of the company or the fact that both sides of the family had outside investments, justified Robert, Stephen and their associated companies in pursuing personal profits outside of MDL rather than through MDL and in respect of the Cadia mine in an area that was within the scope of MDL's business. However, that was not the position in law, as will emerge below.

23 I bear in mind that Robert's evidence in cross-examination was that RKM was (or, more precisely, was intended to become) Stephen's company, in the sense that Stephen was intended to end up with it in succession planning (T282). Robert's evidence in cross-examination was also that RKM owned relevant crushing and other equipment and hired it to BPPL, and subsequently to CCS (also owned by Stephen) which worked the equipment, paid the expenses and paid monies back to RKM (T303); there is no documentation in evidence of such a system, other than an equipment rental agreement between BPPL and RKM (Ex J1, B1045) which I address below; Robert's evidence, and later Stephen's evidence, was that that system was intended to limit liability to RKM if an accident happened at the Cadia mine (T304). The unsigned financial statements for RKM during the 2009 and 2010 years are not consistent with that explanation, since they do not record equipment hire earnings, but record "crushing income" (T304-305). RKM's financial statements for the year ended 30 June 2011 record a substantial item described as "royalty revenue" of approximately $1.864 million, which Robert suggested was likely to be the income from the hire of RKM equipment to BPPL or CCS (T306), although it is not a transparent description of such income. A similar expense item is recorded in BPPL's accounts for the financial year ended July 2011, with the consequence that a significant part of the income from the work done at the

Cadia mine was passed back by BPPL to RKM (T307). In the 2012 financial year, an amount of $3.894 million, now described as “Crushing income – Cadia” comprised revenue from equipment hire by RKM to BPPL (T308).

24 Robert’s position in cross-examination was that RKM purchased crushers for the purposes of resale rather than the provision of mining services; however, contrary information was provided to the Australian Taxation Office in respect of its GST audit, where the Australian Taxation Office was advised that RKM’s business was “mining” rather than the resale of equipment and that the crushers were purchased for a mining contract (T314-315). Robert did not accept that position in cross-examination and contended that the crushers were bought to resell and not to perform work at the Cadia mine (T315-316). I am unable to reach a determination as to which explanation is correct, given the inconsistency in these characterisations. Robert denied in cross-examination that he spoke to Stephen about a plan to acquire the equipment used at the Cadia mine in order to allow RKM to perform the work and hire equipment there or that he intended to put RKM or BPPL in the position to earn money that would otherwise have gone to MDL or that he understood that Stephen was cooperating with him in facilitating that plan from early 2010 (T316). It was at least apparent, and essentially conceded in paragraph 692 of Robert’s affidavit, that he considered that MDL should not acquire equipment once the discussion of the split of assets emerged, unless MDL already had a contract for use of the equipment in place, and he considered it preferable to “subcontract” the work to a “third party”. It was apparent from Robert’s cross-examination that the parties to which the work would be contracted was BPPL or CCS (T317); and those entities are not third parties, but related companies to Robert and Stephen, placing Robert in a position of conflict of duty and duty and duty and interest in any such subcontracting decision.

25 The Robert Murdoch Interests also relied on a lengthy affidavit of Stephen dated 20 November 2017, which addressed his role in the Murdoch Group and also referred to the history of that Group and the organisation of its business. Stephen gave evidence as to the steps taken by Robert towards the acquisition of IMA in 1997 (Stephen 20.11.17 [34]ff) and noted that WJM and MDL were managed together after MDL purchased the IMA site, those companies would

share orders and information and equipment and employees were also shared between them (Stephen 20.11.17 [43], [45]]. Stephen there noted that MDL's main business consisted of quarrying, crushing and grinding stone at the Buckaroo site near Mudgee and later crushing stone at other sites using mobile crushing equipment (20.11.17 [47]). That description of the scope of MDL's business is significant for the issues that I address below in respect of work done by RKM and BPPL at the Cadia mine. He also referred to the circumstances in which the Oberon quarry was acquired and MSC was incorporated, with Robert, Brian, Scott and Stephen as shareholders, and observed that MSC's main business consisted of supplying crushed granite and other materials to the local area (Scott 20.11.17 [55]-[56]). Stephen also addressed the several quarries owned by the Murdoch Group in his evidence (Stephen 20.11.17 [75]).

26 Stephen also addressed Brian's management capacity, referring to his view that Brian could not make decisions about the Murdoch Group and its operations and left decision-making to Robert or others (Stephen 20.11.17 [131]); whether or not that impression was rightly formed, Brian was an equal shareholder in MDL and one of the two directors of that company. Stephen also noted that the companies within the Murdoch Group did not have formal shareholder or directors meetings (Stephen 20.11.17 [141]ff). Stephen also addressed Scott's work within the Murdoch Group (Stephen 20.11.17 [155]ff) and the periods in which Scott had worked outside the Group. Stephen also refers to Scott and Stoneco's use of equipment of MDL and Murdoch Group to perform work for Stoneco and accepts that it is common for the Murdoch Group companies and family members to put items on MDL's accounts, and then to be invoiced for them, but says that Scott would not pay such invoices (Stephen 20.11.17 [215]-[216]). While these matters may have been a further source of irritation within the relationship between Robert and Stephen on the one hand and Brian and Scott on the other, they are not material for the determination of these proceedings.

27 Stephen also addresses the circumstances in which he set up a business of buying and selling crushing machines from 2010, although he says these purchases were made through RKM which was then associated with Robert

(Stephen 20.11.17 [270]ff). He also addresses the circumstances in which a jaw crusher was purchased for MDL, two other jaw crushers were purchased for RKM on a trip to the United Kingdom in 2010, and RKM subsequently purchased three flood-damaged crushers (referred to as the "swamped" crushers) which I address further below (Stephen 20.11.17 [281]ff). Stephen also refers to adverse events within his family from early 2010 and affecting Robert's health from late 2010. I address other aspects of Stephen's evidence in dealing with the chronology of events and with specific issues below.

28 By his second affidavit dated 17 February 2020, Stephen gives further evidence addressing the income derived by RKM, BPPL and Kurdeez Minerals, which appears to be intended to support the expert evidence led in the proceedings. Broadly, that evidence relates to work performed at the Cadia mine, machinery associated with that work, the allocation of expenses and the use of equipment by Kurdeez Minerals. Stephen also there addresses issues in respect of the supply of equipment by RKM and BPPL to MDL and crushing and loading services during the years 2010-2011; RKM's completing variations 6-8 of the Cadia East/Fluor Contract from September 2011 to February 2012; RKM's providing steel sorting services to Cadia Valley Operations ("CVO") from February 2012 to April 2013; and RKM's supply of equipment and crushing and loading services to CVO from July 2011 to January 2014.

29 Stephen was cross-examined as to the role of a production manager and accepted that he was production manager for MDL in respect of its main quarry site at Buckaroo Road, but not in respect of the Cadia mine site (T410). He accepted that he had authority to direct that employees of MDL worked at particular quarries or contracted crushing sites and also had that authority more broadly in relation to the Murdoch Group, because they were a small family company (T410). He accepted that he also had authority to move mobile crushing equipment from site to site in that capacity (T411). His evidence was that he and others, including an employee who filled in as production manager when Stephen was working on the Cadia mine site, made decisions on behalf of MDL and that he had no more authority that Scott in respect of MDL's business (T412). (Plainly, Scott's influence was limited from the point in which he left the Murdoch Group, in about April 2011.) Stephen accepted that his

authority extended to day-to-day activities of MDL such as directing staff and purchasing equipment, but denied that he had the same authority as Robert did between 2009 and 2014, when decisions were always passed through Robert or Brian (T413). There were occasions, in that evidence, where he described decisions as made by "Robert and Brian" (T414) which were likely made by Robert alone. Stephen accepted that he assumed greater responsibilities on behalf of MDL and the Murdoch Group from October 2010 until about May 2012, after Robert had been diagnosed with cancer, but emphasised that he relied on Brian more than he normally would have in that period (T415).

30 Mr Kelly submitted, in closing submissions, that Robert should be accepted as a witness of truth, recognising that the events in issue occurred nearly a decade ago. Mr Bedrossian, with whom Mr Jaireth appears for the Brian Murdoch Interests, submitted that neither Robert nor Stephen were witnesses of credit, and that both deviated from their affidavit evidence in cross-examination and "invent[ed]" evidence to advance positions which they considered advantageous. I do not reach that finding, although it did seem to me that Robert and Stephen's evidence in cross-examination was significantly affected by their belief in the rightness of their position and the level of hostility which had now developed between the Robert Murdoch Interests and the Brian Murdoch Interests. While there were occasions on which Robert responded to questioning in an aggressive way, or referred to other persons as having knowledge of relevant matters, it seemed to me that at least the former reflected his resistance to any challenge to his decisions in cross-examination, rather than any strategic attempt to avoid questioning on those matters.

31 The Robert Murdoch Interests also relied on a lengthy affidavit dated 20 November 2017 of Ms Sullivan, who is (or was) an accountant and bookkeeper employed by MDL. (Robert's evidence in cross-examination is that Ms Sullivan no longer works for MDL because of commitments elsewhere (T252)). Ms Sullivan addressed the accounting for RKM's crusher purchases in the United Kingdom; invoicing for work done at the Cadia mine; documentation for the movement and use of MDL's and RKM's equipment; and other aspects of dealings between Robert and Brian and MDL's income. By a further affidavit dated 17 February 2020, Ms Sullivan led evidence to address certain

categories of work which were in dispute in the proceedings. Ms Sullivan was not required for cross-examination and it is not necessary to summarise her evidence at length.

32 The Robert Murdoch Interests also relied on the affidavit dated 19 November 2017 of Ms Murkins, an executive assistant and bookkeeper with MDL. Ms Murkins has worked with the Murdoch Group since 1998, now on a part-time basis, and is related to Robert's wife. She addresses Robert's role in MDL, the development of tensions between Robert and Brian as long ago as 2007, when Brian and Scott purchased a block of industrial land next to Hi Tech Concrete; Scott's work at the Murdoch Group and the circumstances in which Scott and Stephen commenced taking on activities outside the Group and her knowledge of discussions concerning the split of the companies from November 2009. Ms Murkins also refers to an altercation between Robert and Brian in August 2011, which is relevant only to show the breakdown of the parties' relationship; her evidence is that she typed up a document which appears to have become the basis of a communication from Stephen to Brian in respect of the split of assets in late 2011; and she refers to the creation of a "machinery schedule" identifying where MDL's machinery was in 2010-2012. Ms Murkins was also not required for cross-examination.

33 The Robert Murdoch Interests read an affidavit dated 26 October 2017 of Mr Goodwin, who gave evidence as to the purchase of crushers for MDL and for RKM from the United Kingdom in April 2010, the purchase of the "swamped" crushers for RKM, and the relationship between Brian and Stephen. Mr Kelly submits, and I accept, that Mr Goodwin's testimony was truthful and there was no reason not to accept it, I interpolate, within the limits of his recollection. Mr Goodwin also gave evidence of an occasion between 2010-2012 when he observed a conversation with a third party, where that person had observed that Stephen was "working his own machines", implicitly at the Cadia mine, and Brian said that:

> "I'm OK with Stephen working his own machines there. Scott's developing his quarry at Scone and working for himself." (Goodwin 26.10.17 [73]).

34 Mr Goodwin was briefly cross-examined as to that conversation, and I am satisfied that it occurred and related to the Cadia mine. It does not assist the Robert Murdoch Interests, since RKM (rather than BPPL or Stephen) largely owned and ultimately derived much of the revenue and profit from the equipment used at the Cadia mine, and that conversation falls well short of full and fair disclosure to Brian of the nature of the arrangements involving MDL, RKM and BPPL at the Cadia mine and does not disclose the financial aspects of those arrangements. Mr Goodwin also refers to having inspected the equipment at the Timboon quarry, in early February 2011, when Robert and Stephen were looking to acquire that mine, and he notes that he did not bill for that inspection and billed Kurdeez Minerals (as distinct from MDL) for subsequent work on the machines at the Timboon quarry.

35 The Robert Murdoch Interests also read an affidavit dated 27 October 2017 of Mr Streeter, who was an employee of MDL and is now a permanent casual employee at MDL, and also does work at a company associated with Stephen. Mr Streeter addresses the manner in which work was done at the Cadia mine, maintenance issues in respect of machinery at the Cadia mine, difficulties with use of older machinery at that mine, the transfer of MDL's equipment from the Cadia mine so that it could be used on the RTA contract at Aaron's Pass, and the acquisition of equipment by Stephen (which, I interpolate, was in fact likely acquired by RKM, or possibly BPPL). Mr Streeter also refers to conversations with Brian in which Mr Streeter had referred to Stephen having acquired equipment that was being used at the Cadia mine. I accept that those conversations occurred, but they also fall well short of full and fair disclosure, where Mr Streeter plainly did not know the commercial arrangements involving RKM and BPPL so as to disclose them to Brian. Mr Streeter was not required for cross-examination.

36 The Robert Murdoch Interests also read an affidavit dated 9 November 2017 of Mr Boag, who was a plant operator with MDL, who refers to the transport of equipment to the Cadia mine, the use of equipment which he believed belonged to Stephen (but which in fact belonged to RKM or possibly BPPL) at the Cadia mine, and conversations which he had with Brian about the machines which he understood were used by Stephen (but were in fact

provided by RKM or BPPL) at the Cadia mine. Mr Boag was not required for cross-examination. The Robert Murdoch interests also read an affidavit dated 27 October 2017 of Mr Kemp, who was employed by RKM and also addressed crushing work undertaken by MDL at the Cadia mine and the transfer of MDL's equipment from the Cadia mine for use in the RTA contract at Aaron's Pass. Mr Kemp was also not required for cross-examination.

37 The Robert Murdoch Interests also read an affidavit dated 17 November 2017 of Ms Austin, a former employee of MDL, who referred to the level of communication between Brian and Robert, her negative impression of Scott, the dispute between Stephen and Scott arising from Stephen's purchase of the fuel truck, and the movement of equipment between companies within the Murdoch Group. Ms Austin's evidence does not significantly advance matters, and she was not required for cross-examination. The Robert Murdoch Interests read a further affidavit dated 18 November 2018 of Ms Rhonda Murdoch who referred to her relationship with her brothers, Brian and Robert, the deterioration in their relationship and the steps taken prior to the commencement of the proceedings. Ms Murdoch was also not required for cross-examination.

38 The parties also led expert evidence. The Brian Murdoch Interests rely on expert evidence of Mr Michael Hocking, who was a valuer of real property including mining assets and licensed real estate agent. Aspects of Mr Hocking's evidence travelled well beyond his professional expertise and were not read or not admitted. The Brian Murdoch Interests initially relied primarily on a balance sheet valuation of MDL, not supported by expert evidence, in respect of their claim for an order that Robert sell his shares to Brian, which is no longer pressed. However, they also relied on the affidavit evidence and expert reports of Mr Ashby, a chartered accountant, in response to expert accounting evidence led by the Robert Murdoch Interests. The Robert Murdoch Interests relied on the evidence of Mr Dupont, who is a valuer specialising in mines and the extractive industry, in respect of their claims in respect of the Braeside and Robertson's Knob mines in the Second Derivative Claim and in respect of the Timboon quarry. I will address that evidence below, to the extent it is necessary to do so, in dealing with the particular issues in dispute.

**Chronology of events**

39 I now turn to the chronology of events, which is in part a history of the success of the Murdoch family and their business in the period before the relations between family members deteriorated, and in part a history of the matters which led to the deterioration of that relationship and the commencement of the litigation. I have drawn partly upon admitted facts in the pleadings and partly upon the affidavit evidence and cross-examination. I will refer to aspects of the witnesses' evidence here and other aspects of that evidence in dealing with particular claims below.

40 In the 1950s, the late Mr Tim Murdoch, Brian's and Robert's father, established a business under the business name "WJ Murdoch & Co" involving the quarrying, crushing and milling of dolomite located near Mudgee in New South Wales and, in the early 1960s, Brian and Robert commenced working in the business. WJM was incorporated on 2 May 1983 with Brian and Robert as its directors and, along with Mr Tim Murdoch, equal shareholders. Mr Tim Murdoch then gifted the business at Mt Knowles to WJM and it came under Brian's and Robert's control. From that time until 1996, the business conducted by WJM consisted of crushing, milling and bagging dolomite from the Mt Knowles quarry site. In about 1987, Stephen and Scott became employees of WJM. On or about 21 December 1989, WJM purchased the freehold land on which a quarry site at Mt Knowles near Mudgee is situated.

41 MDL was incorporated on 8 November 1996 and, in about May 1997, MDL purchased IMA's business, assets and operations with funds borrowed from a bank. It appears that Robert procured the loan facility and granted a mortgage over his personal real property assets to do so. There is a dispute, which it is not necessary to resolve, whether Brian would also have been willing to provide a guarantee or personal assets as security for that loan. Brian and Robert have each been a director of and an equal shareholder in MDL. MDL subsequently acquired further land at Mudgee in 1997, and between 1997 and 2002 conducted a quarry at that site ("Bara quarry") extracting rhyolite. There is a dispute as to whether MSC operated the Bara quarry from 2002 to 2014, or as to the terms on which it did so, which it is not necessary to determine.

42 Robert's evidence is that, in 2002, Brian and Robert acquired interests outside MDL in a company which, in a joint venture with a third party entity, owned and operated a limestone quarry at Parkes, although it appears that MDL paid costs in respect of the venture (Robert 20.11.17 [118]). MSC was also incorporated on 19 June 2002 and Brian, Scott, Robert and Stephen have been the directors of that company and BMPL, Stoneco, RKM and BPPL are its shareholders. That company acquired land at Oberon and developed a business thereon for quarrying, crushing and screening another mineral, alaskalite there. In 2006, Brian and Robert sold their interest in the Hi Tech Concrete business on favourable terms, and it appears that that sale allowed funds for the pursuit of other business opportunities.

43 In June 2007, MDL first contracted for work for Cadia Holdings Pty Limited or CVO for the Cadia mine. I refer to the terms of that contract in dealing with the issue relating to work at the Cadia mine below.

44 In October 2007, Scott disclosed an opportunity to acquire an interest in the Timor quarry in the Hunter Valley to MDL, or Robert and Brian, and, after Robert showed no interest in that opportunity, Scott pursued it through his company Stoneco. In his first affidavit, Scott refers to the circumstances in which he became aware of that opportunity in 2007 (Scott 6.7.17 [61]ff) and to Robert's lack of interest in it (Scott 6.7.17 [67]ff), although his evidence does not establish any formal consent by MDL to his pursuing that project, and he also refers to the work which he subsequently undertook in respect of that quarry. Scott's evidence is that the Timor quarry supplies limestone to the Hunter Valley and that quarries in the central west have a greater impact on the Murdoch Group's quarries than that quarry (Scott 6.7.17 [91]). There was a considerable delay in the commencement of work at the Timor quarry, after Stoneco acquired an interest in it, because of issues relating to the development consent which resulted in proceedings in the Land and Environment Court (Scott 6.7.17 [72]ff).

45 Robert's first affidavit dated 20 November 2017 also addresses Scott's involvement with the Timor quarry (Robert 20.11.17 [142]ff). He refers to having been sent information concerning the opportunity to acquire and

develop that quarry and to his conclusion that it would be too costly for MDL to do so (Robert 20.11.17 [144]), to Scott having disclosed his interest in setting up a quarry at Timor in October 2007 and to Robert having responded in a manner that indicated his lack of enthusiasm for the venture (Robert 20.11.17 [146]). Stephen also gave evidence of a discussion with Scott in late September or early October 2007 about the possibility of acquiring the Timor quarry, and of the further conversation in mid-October 2007 when Scott sought to persuade MDL to acquire that quarry; Robert did not agree to that suggestion; and Stephen subsequently suggested to Robert that Scott should "leave the family business and go it alone" and that Scott's acquisition of Timor "could cause conflict within the companies" and again expressed the view that "Scott should leave the company and be paid out" (Stephen 20.11.17 [168]-[169]), in a further indication of the tensions then developing between him and Scott. There is no suggestion in these proceedings that Scott breached his duty in respect of that acquisition, although the evidence does not establish that MDL or Robert expressly consented to (as distinct from not objecting to) Scott's acquisition of that quarry.

46 In late 2007, Stephen bought and then sold a fuel truck at a profit, in a transaction to which at least Scott and possibly also Brian took objection. In his affidavit evidence, Stephen addressed the circumstances in which he acquired that fuel truck and subsequently resold it within a short time for a substantial profit; that matter gave rise to a conflict with Scott; and Robert supported Stephen's conduct of the transaction in a discussion with Brian on the basis that "it is only fair because Scott is off doing his own thing and [Stephen is] working hard for the company" (Stephen 20.11.17 [171]ff). Scott was cross-examined as to that matter and his evidence was that he perceived that Stephen had not dealt with the transaction appropriately and raised a challenge to it with Robert. Scott also perceived that the transaction was within the "company boundary" and his evidence was that Robert refused to do anything about it (T147).

47 In 2008, Brian and Robert travelled to New Zealand to explore a possible business opportunity and, in the course of that trip, identified a possible limestone deposit at Spring Junction, which was later acquired by RK Murdoch

New Zealand Pty Ltd ("RKMNZ"), a company associated with Robert and Stephen. Robert's first affidavit (Robert 20.11.17 [162]ff) addresses the circumstances in which he and Brian saw the Spring Junction land during the trip to New Zealand in 2008. Robert's evidence (Robert 20.11.17 [180]) is that he disclosed to Brian that Stephen "might have a go" at the Spring Junction land in May 2009. He refers to the circumstances in which RKMNZ acquired that property during 2009 and 2010. He also refers to subsequent difficulties with the development of that land and his evidence is that he would be obliged to sell it in 2018 (Robert 20.11.17 [186]). Robert confirmed in cross-examination that RKMNZ acquired the Spring Junction land with a view to establishing a quarry, but that ultimately no quarry was established (T260). Stephen's evidence also addresses the acquisition of that land (Stephen 20.11.17 [530]ff).

48 Brian's evidence is that he travelled with Robert to New Zealand to inspect a limestone quarry site as a possible purchase for the Murdoch Group (I interpolate, as distinct from MDL) in early 2009 (although he appears to be in error as to the date of that trip) and to Robert having expressed the view that the Murdoch Group should not purchase that site, because there were limited opportunities for that operation in New Zealand, and MDL would be a foreign investor for New Zealand purposes (Brian 8.7.17 [92]). Brian's evidence is that, but for that conversation, he would have supported a decision that MDL acquire that site. Brian also refers to Robert having later advised that Stephen and Robert had decided to go ahead with the acquisition of that site on their own (Brian 8.7.17 [94]).

49 Brian was cross-examined at some length as to the New Zealand trip, although he said that he had only a vague recollection of it (T227). Brian had difficulty in responding in cross-examination to a question concerning any consent to Stephen being involved with the New Zealand quarry and appears to have misunderstood that question as involving a splitting of the companies (T233). Nothing turns on that where the level of disclosure made by Robert and Stephen in respect of RKMNZ's acquisition of the New Zealand quarry would not have amounted to a narrowing of the scope of the duty or to ratification,

had a breach of duty otherwise been established. I address the claim in respect of that acquisition below.

50 In July 2009, Scott purchased a mobile crusher outside the Murdoch Group and made that available to a third party for some crushing work in South Australia. Robert addresses this issue in his first affidavit (Robert 20.11.17 [209]). Scott's evidence in his second affidavit is that crushing equipment that he acquired for the Timor mine was used for the South Australian project and he denies that he was seeking to establish a crushing business rather than to undertake crushing at the Timor mine (Scott 29.3.18 [78]-[79]). Scott was cross-examined as to Stoneco's acquisition of that crusher (T129ff) and his evidence was that that crusher was acquired for the Timor mine rather than to be made available for contracting use. Scott's evidence in cross-examination was also that he had disclosed the opportunity for crushing work in South Australia to Stephen, and sought to have MDL or MSC do that work in order to assist the client, but that Stephen considered the equipment should not be sent from New South Wales to South Australia to crush a relatively small volume of granite (T154). Robert's evidence in cross-examination was that Brian discussed that work with him and that he approved it in any event (T274). I accept that matter had been sufficiently disclosed to MDL, and the fact that Stoneco then took up that opportunity, after MDL rejected it, does not provide any basis for any narrowing of the scope of MDL's crushing business or for RKM or BPPL to take up other opportunities within the scope of MDL's business without full and fair disclosure.

51 In late September 2009 or October 2009, Brian and Robert acquired a half interest in the Bylong quarry and, importantly, did so for themselves and not for MDL (Robert 20.11.17 [222]ff). That evidence is significant, so far as that acquisition did not take place within MDL or indeed in any company in the Murdoch Group.

52 It now appears to be common ground that, on 20 November 2009, Brian, Robert, Scott and Stephen met and agreed, at least in principle, to split their respective interests, although no attempt was made to identify how that would be implemented or who would take particular assets and that split was not later

agreed or implemented. Robert's evidence is that Scott and Brian both indicated at that meeting that they wanted to split the company, Brian indicated a perception that he and Scott "aren't in the loop" and Robert indicated that he was "happy to" take the course of splitting the company. Robert also refers to his diary entry which records:

> "Meeting Robert Brian Scott Stephen resolved that we split the companies up. Scott needs the equipment & the money to Fund Scone contact quality valuer surveyors ...'

53 That entry appears to support Robert's evidence of this meeting, although his evidence is that it was his note of how the split of the company might be done rather than a record of the conversation (Robert 20.11.17 [246]-[247]). Robert also refers (Robert 20.11.17 [249]) to his understanding and belief that Brian and he shared the view, from that date, that the Murdoch Group had to be divided between Brian and Scott on the one hand and Stephen and Robert on the other, and to a number of factors that delayed the implementation of that transaction (Robert 20.11.17 [249]-[250]).

54 Robert's evidence (Robert 20.11.17 [253]) is also that he had no doubt as a result of that meeting "that the family business relationship had come to an end" and to his perception that he was "freed from the relationship so that Stephen and [he] could do our own thing" (Robert 20.11.17 [254]). Robert does not explain as to how that could have occurred, where the split of assets had not then been implemented, and has still not been implemented. It is not necessary to determine whether Robert had that perception, as a matter of fact; to the extent that he had such a perception, it was not reasonably based where the relevant companies still held substantial assets and that perception did not narrow or extinguish his duties to those companies. Notwithstanding the emphasis that is placed on this matter by the Robert Murdoch Interests, it seems to me that it was never seriously arguable that a discussion of a split of the Murdoch Group, where the manner in which it was to be implemented was not resolved and where it was not in fact implemented, gave rise to any narrowing of the duties owed to the companies by Robert or Brian, or by Scott or Stephen as employees of the companies.

55 In an earlier affidavit filed in the proceedings, which was not read by the Robert Murdoch Interests but was put to Robert in cross-examination, his evidence was that he understood that Brian and he shared the view that the Murdoch Group was to be divided since November 2009 but that there had never been an agreement between the parties as to how and when that would occur or who may acquire which shares or assets of the entities within the Murdoch Group (T264). It seemed to me that that evidence accurately recorded the position and, after some hesitation, Robert conceded that matter in cross-examination (T265). Robert also characterised the split of assets in his affidavit dated 20 November 2017, again correctly in my view, as a "possibility" (Robert 20.11.17 [691]). It seems to me that that both parties likely accepted the desirability of that course, but there were real practical difficulties in its implementation, as events have demonstrated. Again, Robert essentially conceded that matter in cross-examination (T266).

56 Stephen also gave evidence of the November conversation, after first referring to Robert's and his discontent with Scott's lack of involvement with the Murdoch Group. His evidence was that Scott said that "We want to split the companies up. It's not working" and Robert responded "that's fine by me" (Stephen 20.11.17 [182]ff); he also referred to Brian and Scott's appearing "happy" with Robert's response, and to his conversation with Robert in which they also welcomed that position (Stephen 20.11.17 [197]-[198]).

57 Brian did not accept the fact of that meeting in his earlier evidence. He initially denied, in first his affidavit dated 6 July 2017, that there was a meeting in November 2009 in which Robert and he "agreed" that the business, including WJM and MDL, should be divided and his evidence there was that:

> "There has never been such a meeting and we have never agreed to divide up the family business and to conduct separate businesses."

He there acknowledged that there had been discussions over several years since 2012 about separating the businesses and his evidence was that there "certainly was no such discussion in 2009". In his second affidavit dated 28 March 2018, Brian again denied that a meeting took place on 20 November 2009 and denied that he would have said to split up the company (Brian 28.3.18 [12]). I am satisfied that Brian was in error in this recollection and that

the separation of the business was discussed at a meeting in November 2009, although no agreement was then reached as to the details of how a separation of the business could be implemented and it was not in fact implemented thereafter. I am conscious that Brian's denial of this meeting undermines the reliability of his evidence.

58 In March 2010, MDL and CVO entered a further contract in respect of the Cadia mine, referred to as the Fluor Contract, to which I return below. In April 2010, Robert, Stephen and Mr Goodwin travelled to the United Kingdom and Ireland to purchase crushers for MDL and also for RKM. Later in April 2010, RKM also acquired three flood-damaged crushers (referred to as the "swamped" crushers) from another quarry, which are the subject of a claim in the proceedings that I address below. The Brian Murdoch Interests now appear to accept that acquisition was by RKM and not by MDL, although it was originally treated in MDL's accounts as an acquisition by MDL, apparently in error, and that treatment was later sought to be reversed by a record of a "sale" of the crushers to RKM.

59 In May 2010, an issue arose at the Cadia mine (which has been described in the proceedings as to "Cadia emergency") and a further issue in respect of block caving subsequently arose at the Cadia mine. MDL provided additional crushing services to CVO, initially on a short term basis and then on an extended basis, through a series of successive purchase orders, but a significant amount of the work was subcontracted to, or equipment was hired from, RKM and BPPL in a manner that ultimately diverted a large part of the revenue and profit from that work to RKM or BPPL.

60 Some attempt was made to progress the suggested separation of assets with the Murdoch Group between Brain and Robert and, on 6 July 2010, a valuer advised Scott Murdoch that he would be able to undertake a valuation of various properties and quarries held by MDL and WJM and indicated the information that would be required for that valuation (Ex J1, B960).

61 As I noted above, in October 2010, Stoneco purchased a second hand jaw crusher and then provided some crushing services to a third party South Australia. By late 2010 or possibly 2011, Scott appears to have recognised that

crushers supplied by Stephen (although in fact owned by RKM) were being used at the Cadia mine.

62 In January 2011, Stephen and Robert inspected a quarry at Timboon in Victoria and RKM later acquired the Timboon quarry. I address the evidence as to that transaction below.

63 At about the same time, Scott inspected the Braeside quarry near Scone in New South Wales and Stoneco later acquired the Braeside quarry and, in an associated transaction, the Robertson's Knob quarry. In his first affidavit, Scott refers to the circumstances of his taking over the lease at the Braeside and Robertson's Knob quarries and he contends that neither competes with the Murdoch Group's operations (Scott 6.7.17 [84]). Again, his evidence does not suggest that he obtained any formal consent was obtained from MDL to his acquiring those leases, and he acknowledges that there was an occasion on which he successfully tendered to supply the Australian Rail Track Corporation from the Braeside quarry, in competition with MDL's Bylong quarry (Scott 6.7.17 [88]). Scott's evidence, and that of several other witnesses, does not clearly distinguish between steps which he took personally and steps undertaken by Stoneco, the company which he controls, in that regard.

64 Robert also gives evidence of the circumstances in which he became aware of Scott's acquisition of the Braeside quarry (Robert 20.11.17 [406]ff); his evidence, to which no objection was taken, is that but for the decision to split the Murdoch Group, that quarry could have added "significant value" to the Murdoch Group. It seems to me that, although Robert seeks to link this matter with the discussion of splitting the Murdoch Group, it is primarily significant for establishing, consistent with the parties' earlier behaviour, that they, including Scott and Brian, did not then have any understanding that the scope of MDL's activities extended to the acquisition of other quarries or that they were not free to acquire such quarries for themselves or associated companies. I address the challenge to this transaction in the second derivative action brought by the Robert Murdoch Interests below.

65 On 30 March 2011, to which Scott referred as "D-day", he decided to cease working for the Murdoch Group and undertake a separate business (Scott

29.3.18 [61]), although he continued to receive a salary from the Murdoch Group, a matter that was in dispute but is no longer pressed. Scott there attributes his decision to leave the Murdoch Group to his belief that Robert and Stephen were "doing the wrong thing" by Brian. He gave more nuanced evidence in cross-examination that his leaving the Group related to "a matter between the parties" and the a "working environment" which I understand to be a reference to difficulties in the working relationship, although he also pointed to his concerns as to the fuel truck that had been acquired by Stephen and then sold and the work that was being done (I interpolate, apparently by Stephen but in fact primarily using RKM equipment) at the Cadia mine (T140).

66 Scott's evidence (Scott 29.3.18 [63]) is that, in April 2011, he identified amounts paid to entities that he did not recognise as part of the Murdoch Group, from MYOB files for the Murdoch Group that were provided to him in electronic form by the Group's accountant, Mr Portelli. Scott's second affidavit also refers to a meeting with Mr Portelli in mid-2011 to review the MYOB accounts, where he noted payments to BPPL and RKM of which he was not previously aware, and saw a reference to the business name "MDL Crushing" which he subsequently found was owned by RKM (Scott 29.3.18 [112]). Scott, in cross-examination, rightly recognised the difference between third party subcontracting to MDL and subcontracting by companies associated with shareholders and directors (T149), where the latter plainly raises a risk of transfer of value which arms' length transactions with third parties do not. Scott also referred, in cross-examination, to his "shock" that RKM and BPPL had become the supplier of a product that MDL's "core business does" and said that he raised his concern that money was being "diverted" from MDL in this fashion with Brian (T150).

67 It appears that the information made available to Scott in April 2011 included a supplier's payment register which indicated that, by that time, an amount of $1,464,529 had already been paid by MDL to BPPL for work done at the Cadia mine (T201). At about that time, Scott raised that matter with Stephen and suggested that BPPL had taken $1.5 million out of MDL and that "we are not happy" (Robert 20.11.17 [403]; Scott 29.3.18 [55]; T201). Although Scott was cross-examined at some length as to whether his comment was intended to

suggest that BPPL had "taken" $1.5 million as distinct from doing $1.5 million worth of work (T201), it seems to me that Scott had then recognised, correctly, that the opportunity to do work valued at nearly $1.5 million had been diverted from MDL to BPPL. Scott confirmed in cross-examination that he recalled speaking to Stephen and indicating that he was not happy that that amount of money had been taken from MDL (T205). Scott's evidence is that he and Brian had viewed the supplier's payment ledger at his house and it was Scott and Brian's shared opinion that BPPL had taken that amount out of MDL (T207). Scott was also cross-examined as to the extent to which he informed Brian of his concerns and his evidence was that Brian was "fairly understanding of the matters" but was "lost to know what to do" before advice was sought from solicitors. That evidence seemed to me to be consistent with the probabilities.

68 In mid-2011, MDL contracted with the Roads and Traffic Authority to provide crushing services for roadwork at Aaron's Pass, where work commenced in the week of 13 July 2011 and continued until December 2011. The Robert Murdoch Interests rely on this matter to demonstrate that MDL did not have equipment available to perform the work at the Cadia mine, although I will return below to the well-established position that that is not an answer to a claim for breach of fiduciary duty arising from the conflict or no profit rules, particularly where an account of profits is sought.

69 Scott's evidence is that, in late 2011, he raised with Stephen the fact that Stephen's crushers were being used at the Cadia mine and suggested that he should have the same opportunity (Scott 29.3.18 [79], T197). Again, that conversation did not recognise that RKM's equipment was primarily used at the Cadia mine and it derived much of the profit from the work done there.

70 In mid-November 2011, Robert, who was then undergoing treatment for cancer, made a first detailed offer as to the terms of a split of the Murdoch Group which did not address the position in respect of the shares in MDL (Ex J1, 1601; Robert 20.11.17 [435]ff). Robert accepted in cross-examination (T267) that that proposal was rejected by Brian. Stephen sent a second offer to split the Murdoch Group, apparently at Brian's request, in December 2011 (Robert 20.11.17 [451]ff). Robert accepted in cross-examination that that

second proposal was sent with his approval and authorisation (T269). Robert's evidence is that Stephen then advised him that Brian had said that he would take the offer, if it was reversed so that he acquired the assets which Robert and Stephen had proposed to keep. Robert did not accept that counter-proposal.

71 Further work was done at the Cadia mine in February 2012, under Fluor Contract variations 6–8, and in mid-March 2012, RKM or BPPL commenced steel–sorting work at Cadia, hiring some equipment from MDL to do so. I address the issues as to that work below.

72 Brian and Robert attended a meeting with a solicitor who had done work for them and the Murdoch group to discuss the splitting of the Murdoch Group in March 2012. A letter prepared by Scott, based on Brian's recollection, and sent to Brian's solicitor on 18 March 2012 (Ex J1, B1739) recorded what occurred at that meeting as follows:

> "Bob said to [the solicitor] that [I] had something to say. [I] then said I wanted to have the companies assets valued with the view to Splitting them, Robert agreed at this point, [the solicitor] then proceeded to explain the Valuation, Tax etc costs required to do this, at which point Robert then was not in agreement to getting a valuation, he made some suggestion re Shares and this was discussed amongst us all, [MDL's solicitor] didn't feel this was Suitable for a family company, [the solicitor] said to Robert what did he feel the Companies Value Was and he said 14million, [the solicitor] commented that does this include Business good will Bob said no as We have no current contracts and he felt there was no good will value ???" [question marks in original]

73 That letter also records discussion of the Rylstone quarry at that meeting and Brian then records that:

> "I discussed with Robert part of my reasons for splitting including the fact I am not being told everything that is happening and not being given bank account balances and that he was signing Cheques without me Agreeing. [I didn't discuss the full details of my knowledge of his activities.]
>
> At this point he commented you can come out to the office and sit there for 5 days a week if that's what you want, I conveyed that this is not the information I am requiring. Robert then said and I am thinking about not going out there anymore myself anyway.
>
> The meeting ended with [the solicitor] saying that no partner can make the other sell or split their interests."

That letter also recorded Robert having said to Brian, after the meeting with the solicitor had ended, that he and Stephen "are thinking about closing MDL down as they have other things to do". That letter highlighted the difficulty that Brian then faced in addressing these issues, which I accept was real, by observing that he was looking to the solicitor now retained in these proceedings for guidance and that:

> "[The solicitor's] comments re Splitting made me feel a lot helpless, I understand he is not aware of Roberts activities and he made it clear to me he could not advise us separately."

74 Correspondence between the parties' solicitors as to the issues raised in these proceedings commenced by 25 May 2012 (Ex J1, B17825) and, from mid-2012, Brian did not attend a proposed directors' meeting and management meeting of the Murdoch Group companies.

75 Stephen subsequently resigned as production manager at MDL on 28 February 2014, by letter sent to Robert (Ex J1, B2105). Brian commenced the proceedings to which I refer as the "First Derivative Claim" in March 2016 and the several other proceedings followed.

**First Derivative Claim**

*Claim against Robert in respect of work done at the Cadia mine*

76 As I noted above, by an Originating Process filed on 20 January 2016 and a Further Amended Statement of Claim filed on 14 August 2019 ("FASC"), Brian seeks certain orders on behalf of MDL in derivative proceedings. The First Defendant in this claim is Robert; the Second, Third, Fourth and Fifth Defendants (as identified in the FASC, but not the Originating Process) are Stephen, RKM, BPPL and Kurdeez Minerals respectively. Two aspects of this claim, relating to work done by RKM at the Cadia mine and the acquisition of the Timboon quarry are pressed, and other matters were not pressed at the hearing. It will be convenient to deal with these issues in turn, dealing with the relevant legal issues in respect of the Cadia claim and not repeating that analysis in respect of the claim relating to the Timboon quarry.

77 MDL pleads [FASC [5]) that, in the financial years ending 30 June 2008 and 30 June 2009, MDL successfully tendered for and subsequently performed

crushing, grinding and associated work at the Cadia mine for Cadia Holdings Pty Limited and CVO or other entities engaged in the conduct of the Cadia mine. The Robert Murdoch Interests plead (Defence [5]) the entry into several contracts relating to the Cadia mine and otherwise deny the paragraph. MDL also pleads (FASC [6]) that, in the financial years ending 30 June 2009, 30 June 2010 and 30 June 2011, MDL successfully obtained, through contracts and variations to contracts with CVO, ongoing opportunities and entitlements to perform remunerated work and deliver remunerated services comprising of, or in relation to crushing and grinding work at the Cadia mine. The Robert Murdoch Interests again plead (Defence [6]) the entry into a further contract and several variations relating to the mine and otherwise deny the paragraph.

78 MDL pleads (FASC [7]) that, in or about the financial year ending 30 June 2011, Robert and Stephen caused MDL to sub-contract to RKM and/or BPPL the task of undertaking work pursuant to the Cadia Contracts and/or to permit RKM and/or BPPL to undertake work for the purposes of the Cadia Contracts. The Robert Murdoch Interests plead (Defence [7]) a sprawling defence to these paragraphs referring to particular activities. MDL also pleads (FASC [8]) that, in or about the period from the financial year ending 30 June 2011 to the financial year ending 30 June 2014, Robert and Stephen procured opportunities for RKM and/or BPPL to carry out crushing and grinding work at the Cadia mine, being the same or a similar type of work that had previously been performed by MDL. The Robert Murdoch Interests again plead (Defence [8]) sprawling defences to these paragraphs referring to particular activities and otherwise deny the allegation. There is ultimately also little contest as to the facts of this matter, as distinct from whether it amounted to a breach of duty.

79 MDL pleads (FASC [9]) that, further or alternatively, Robert encouraged or permitted Stephen, RKM and/or BPPL to pursue and obtain (to the exclusion of MDL) the same, or a similar type of, work that had been previously performed by MDL. The Robert Murdoch Interests repeat their defences to paragraphs 7 and 8 and otherwise deny the paragraph.

80 MDL also pleads (FASC [10]-[11]) that it would have been in MDL's interests for such further or other work at the Cadia mine to be pursued and undertaken

in the name of MDL and MDL would have been able to undertake such remunerated work and that, so far as there was any work, which MDL was able and was entitled to perform at the Cadia mine, that was caused to be sub-contracted to RKM and/or BPPL, it was not reasonably necessary and it was not in the interests of MDL that such work be sub-contracted in that manner or at that price or at all. The Robert Murdoch Interests plead (FASC [10]-[11]) affirmative responses to those paragraphs and otherwise deny them. I am not satisfied that MDL have shown that it should have acquired the additional equipment necessary to do this work or that it could have hired it at reasonable cost. However, it is not necessary for MDL to establish this matter to succeed in its claims for breach of the statutory and equitable duties arising from conflict of duty and interest and duty and duty affecting Robert in these matters.

81 MDL also pleads (FASC [19]) that, beginning in or about the financial year ending 30 June 2012, Robert and Stephen failed to cause MDL to re-tender for further work in relation to the Cadia mine and caused RKM and/or BPPL to tender for further work in relation to the Cadia mine and/or otherwise directed available work at the Cadia mine away from MDL to RKM or BPPL. In closing submissions, Mr Kelly put, and I accept, that the duty pleaded in paragraph 19(a) of the Further Amended Statement of Claim would, in substance, be a positive duty (that is, to cause MDL to retender for work) which could not be characterised as a fiduciary duty under the present state of Australian law: *Breen v Williams* (1996) 186 CLR 71 at 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [74]. However, that is not an answer to the substance of MDL's claims for breach of the no conflict and no profit rules or breach of the pleaded statutory duties. MDL also pleads (FASC [21]), on and from about the financial year ending 30 June 2011, RKM and/or BPPL obtained the opportunity to perform and performed further work in relation to the Cadia mine. The Robert Murdoch Interests largely repeat earlier pleadings and deny the allegations.

*Evidence as to work done at the Cadia mine*

82 Turning now to the evidence, Brian's evidence in his first affidavit was that MDL had obtained significant income from crushing work undertaken at the Cadia

mine and he also referred to the loss of that income in recent years. His evidence is that he had not consented to MDL holding back from tendering for that work or not doing that work (Brian 6.7.17 [98]). He also outlines the work previously undertaken by MDL at the Cadia mine, involving the use of mobile crushing equipment and, in particular, crushing circuits (Brian 6.7.17 [99]).

83 As I noted above, MDL first contracted to work for CVO for the Cadia mine in June 2007, to perform certain crushing services at the Cadia mine and that work continued through the 2008 and 2009 financial years. The initial contract (Ex J1, B100) identified the relevant works as "manufacture of blast hole stemming material using mobile crushing plant & earth moving equipment" and was for an initial 12 month period, with an option of a further 12 months, and named Stephen as "production manager" and one of the "key personnel" in respect of the contract. The work was directed to producing "stemming aggregates" from waste ore at a site within the Cadia mine known as the "Blue Dump" (Stephen 20.11.17 [225]-[228]). On 9 April 2008, CVO exercised the option to renew the contract for an additional 12 months and issued MDL a site works and services agreement in respect of variation number 1 for the production of stemming gravel for the open cut blasting operation at the Cadia mine (Ex J1, B337ff). A memorandum prepared by CVO dated 14 May 2008 in support of that extension noted that MDL were the current contracted provider of stemming material used to stem blast holes in the Cadia open pit; that MDL manufactured that material using a mobile crushing plant and earthmoving equipment to crush blue waste rock on site; that MDL had consistently supplied a quality product delivered on time and had shown appropriate safety standards; and recommended the extension of that contract. On 6 July 2009, a variation (Ex J1, B496) further extended the term of the contract for 12 months, with a completion date of 31 May 2010 and CVO subsequently issued further variations for stemming gravel production at the Cadia mine again extending the period and value of the work (for example, Ex J1, B949; Stephen 20.11.17 [228]; Cooper, Ex D9, [31]). The evidence establishes that MDL's income sources during that period included income from external crushing contracts (Sullivan 20.11.17 [177]ff).

84 In March 2010, MDL and CVO entered into a further contract in respect of the Cadia mine, referred to as the Fluor contract, for the supply of crushed rock for use as road base for infrastructure works relating to the Cadia East development. Robert's evidence addresses his involvement with negotiations for the Fluor contract at the Cadia mine (Robert [307]ff). Stephen also refers to the separate Fluor contract involving the production of road base construction material for the Cadia East mine site (Stephen 20.11.17 [229]ff). Stephen outlines equipment used for the first Cadia contract from 2007 (Stephen 20.11.17 [241]ff) and for the first part of the Fluor contract from mid-February 2010 (Stephen 20.11.17 [252]ff). His evidence is that, until July 2010, MDL only had enough crushers to make up two "mobile circuits" and that it acquired a jaw crusher to complete a third crushing circuit and to use for the Fluor contract in 2010 (Stephen 20.11.17 [260]ff).

85 A production problem then arose at the Cadia mine between May 2010 and September 2010 (which has been described in the proceedings as to "Cadia emergency") and a further issue in respect of block caving then arose at the Cadia mine. MDL provided additional crushing services to CVO, initially on a short term basis and then on an extended basis, through a series of successive purchase orders, priced by reference to machine hourly hire rates. As will emerge below, a significant amount of equipment was hired from RKM and BPPL in a manner that ultimately diverted a large part of the revenue and profit from that work from MDL to RKM or BPPL.

86 Robert's evidence addresses the development which he describes as the "Cadia emergency" (Robert 20.11.17 [319]ff). Robert's evidence is that MDL invoiced CVO for the work undertaken during the "emergency" and then paid RKM and BPPL for the costs of providing "their equipment" so that MDL could perform the work (Robert 20.11.17 [332]); that evidence is incorrect, so far as RKM rather than BPPL owned the relevant equipment. Robert's evidence is also that MDL did not then have a full circuit of equipment available to perform the Cadia emergency work and maintain the Cadia East/Fluor contract (Robert 20.11.17 [334]). That evidence does not address the possibility that MDL could have acquired such equipment, and in any event is not capable of answering a breach of the no conflict and no profit rules, as I will note below. Robert also

refers (Robert 20.11.17 [336]) to MDL's receipt of total income of about $2.674 million in respect of this work, and to receiving net income of about $1.320 million after payment of equipment hire invoices to RKM and BPPL; the consequence is that revenue of at least $1.35 million was received by RKM and BPPL for the hire of equipment which RKM rather than BPPL owned. Mr Cooper also noted (Cooper, Ex D9, [34]) the significance of a fixed unit rate pricing for MDL's risk profile in respect of the works.

87 Stephen's evidence also addresses the circumstances of the initial "emergency" work at the Cadia mine from May 2010, initially in respect of a planned shutdown of the underground mine (Stephen 20.11.17 [319]ff). Stephen also refers to continued block-caving problems at the Cadia mine from mid to late May 2010, and to the performance of work by MDL, RKM and a third contractor on a day-to-day basis, on the basis of purchase orders, before the third contractor was relocated to other work (Stephen 20.11.17 [324]ff). Stephen also addresses the circumstances in which a jaw crusher owned by MDL, which was being repaired, was replaced by another jaw crusher that had been acquired by RKM as one of the "swamped crushers", and to various movements of crushers which had the result that both RKM and MDL crushers were used at the Cadia mine (Stephen 20.11.17 [343]ff).

88 Stephen's evidence is that Robert suggested to Stephen that a hire agreement be prepared for the use of RKM equipment at Cadia in June 2010 and, for reasons that he does not explain, MDL and BPPL (which did not own that equipment) then "negotiated" an equipment rental agreement and equipment owned by RKM was then made available to CVO by BPPL (Ex J1, B1045; Stephen 20.11.17 [352]). That equipment rental agreement was signed by Robert, implicitly on behalf of MDL and by Stephen, implicitly on behalf of BPPL and identified BPPL as the lessor of equipment including the XA 400 cone crusher and further equipment including excavators and other crushers listed in a variation to the contract. The term of the lease was left blank in that agreement. The agreement provided, in section 12, that the equipment was and would remain property of BPPL and MDL would have no right, title or interest in it except as set out in the lease; that provision was false as a statement of fact, so far as the equipment was largely not the property of

BPPL. A variation dated 3 October 2010, also signed by Stephen for BPPL and Robert for MDL (Ex J1, B1055) recorded that BPPL will be entitled to the "negotiated crushing rate" and MDL will "raise an income for the operators of the machinery" which would be charged at a specified rate and that MDL "will allow [BPPL] to finish any outstanding contracts should MDL not be able to finish them". Any negotiation of that agreement or the variation was undertaken in plain conflict of interest, given Robert's roles in MDL and RKM, quite apart from the oddity that MDL negotiated to hire equipment that BPPL did not own from BPPL.

89 Stephen also refers to further work undertaken at the Cadia mine from the beginning of September 2010, when MDL machinery was being used on the Fluor contract, and Stephen directed that RKM's equipment be used to undertake the further work requested by CVO (Stephen 20.11.17 [356]ff).

90 The period of the Fluor contract was extended by five successive variation orders through until end of June 2011, which increased the contract value from an initial value of a maximum of $100,000 to about $2.485 million (Cooper, Ex D9 [35]). Robert's evidence (Robert 20.11.17 [343]ff) addresses the progress of the Cadia East/Fluor contract and the issue by CVO of variations in respect of that contract. His evidence is that MDL performed the Cadia East contract and five of eight variations to that contract and three remaining variations were performed by RKM, at a time that MDL had tendered for a contract with the Roads and Traffic Authority for other work valued at $1.2 million. I refer to that matter below.

91 I note, for completeness, that Stephen's evidence and Mr Cooper's expert evidence (Ex D9) address the extent to which MDL's equipment was compliant with a standard issued by the NSW Mine Safety and Health Regulator, known as "MDG-15", where non-compliant equipment could not be used on the Cadia mine. It is not necessary to address that issue, because it is no answer to a breach of the no conflict or no profit rules that the beneficiary of the duty would not itself have had the operational capacity to earn the relevant profit, nor does this evidence address MDL's capacity to obtain compliant equipment in order to derive that profit for itself. Mr Cooper also addressed commercial practices

in respect of crushing equipment in his report, in a manner which provides some background to the claims, including the risks in purchasing equipment and depreciation practices. Aspects of his report, including as to hire rates, were not read, and he also addressed depreciation in respect of plant and equipment owned and operated by RKM and BPPL, the rates of remuneration adopted for Robert and Stephen (although the relevance of that evidence was obscure), the risk involved in the purchase of the swamped crushers, and matters relating to the method adopted or "steel sorting" at the Cadia mine commencing from February 2012. Mr Cooper expresses the view, which is plausible, there was an element of skill and innovation involved in that approach, that is of little practical relevance where I have held the circumstances of the breach is such that no additional allowances should be made, to reduce the level of profit for which RKM and BPPL are required to account to MDL.

92 In 2011, CVO also offered MDL an opportunity to take up a substantial "concentrator contract" which had previously been awarded to another contractor, Clarks Civil. Robert also addresses, and was cross-examined at some length about, negotiations in respect of the potential concentrator contract at Cadia (Robert 20.11.17 [357]ff). Stephen also addresses the discussion of the concentrator contract at the Cadia mine which did not proceed (Stephen 20.11.17 [536]ff). In cross-examination, both Robert and Stephen emphasised the difficulty of execution of that contract, and the fact that the contractual terms would allow CVO to terminate the engagement on 30 days' notice, and MDL did not take up that contract. It appears that CVO may ultimately not have proceeded with that contract with any supplier. Notwithstanding the amount of time that was spent on this matter, its relevance is only that it demonstrated that Robert and Stephen contemplated the possibility that further work could be shifted to RKM or BPPL, and were prepared to present BPPL to CVO as a subsidiary of MDL, which it was not, in order to promote that possibility.

93 Plant and equipment owned by MDL was shifted from the Cadia mine around the end of May 2011 and equipment used on the Cadia mine was thereafter owned by RKM or, possibly BPPL (Cooper, Ex D9 [36]). Stephen's evidence is

that MDL's equipment was then moved from the Cadia mine to the Parkes quarry from the end of May 2011, and then used for a contract with the Roads and Transit Authority for work at Aaron's Pass (Stephen 20.11.17 [367]ff). RKM sold the XA 400 crusher known as "Big Wings" to MDL for use in that work, and an invoice dated 30 May 2011 specified the price of $310,000 (Ex J1, B1345). Stephen also refers to the sale of that crusher from RKM to MDL for use on the RTA contract in mid-2011 and gives evidence of a conversation with Robert concerning that sale (Stephen 20.11.17 [391]ff). That transaction was undertaken in an obvious conflict of interest, with Robert making the decisions for both RKM as vendor and MDL as purchaser in the transaction.

94 Excavators and other equipment owned by RKM or BPPL were then deployed to the Cadia mine in support of the work undertaken by RKM and were also hired on a casual basis to CVO or other contractors or sub-contractors to CVO, either on the basis of hourly hire of the machine, or on a basis which included provision of an operator (Stephen 20.11.17 [542]ff). By a diary note dated 18 October 2011 (Ex J1, B1498), Stephen recorded his rationale for the work done by BPPL at the Cadia mine, in response to Scott's allegation that monies have been taken from MDL, as follows:

> "[Scott] thinks I have taken $1.5m out of Company. If he only knew. The only work I have picked up is work that MDL couldn't do and clients would have done if I hadn't. There was no contract it was only going for 3 weeks didn't think it would go on for 4 months 24 hrs a day."

There was a degree of controversy as to the phrase "[i]f he only knew" which it is not necessary to determine. Stephen also recorded a meeting with a representative of CVO in relation to the Fluor Contract in his diary for 25 October 2011 (Ex J1, B1516).

95 Robert's evidence in cross-examination was that he recognised in late 2011 that the pursuit of his own endeavours outside MDL, in relation to work that MDL could have done, would have created a conflict between his interests and MDL's interests, or at least that he would not do that work if MDL "could do it" (T272). I understand that evidence to reflect, not an acknowledgment that a conflict existed in the relevant circumstances, but Robert's reliance on the proposition that no conflict existed if, in fact, MDL did not have the equipment

to do the work and RKM did. That proposition was not correct, as I have noted elsewhere in this judgment.

96 Further work in respect of the Fluor contract under variations 6-8 continued into 2012, provided by equipment owned by RKM and was billed by RKM to Cadia, and other work was provided by RKM or BPPL under purchase orders from Cadia (Cooper, Ex D9, [36]-[37]). Robert's evidence is that, after MDL equipment was moved from Cadia East, Cadia requested further variation work to be undertaken under variations 6-8, and that work was completed with equipment owned by RKM and held for hire or resale. Robert's evidence is that MDL did not then have equipment available to perform the variations; that it would have needed to hire equipment in order to perform the work; and that he formed the view that it would not be in MDL's financial interest to buy more equipment without the certainty of more work (Robert [351]-[355]). Robert does not address the feasibility of MDL hiring equipment in order to perform that work and, to the extent that he made judgments as to this matter, he did so in circumstances of a substantial conflict of duty and interest and duty and duty, as between his duty owed to MDL and his duty owed to and his interest in RKM.

97 RKM commenced the work on steel sorting following discussions with Cadia involving Stephen in late February-March 2012 (Robert 20.11.17 [378]ff). Robert's evidence in cross-examination was that RKM took on the steel sorting at the Cadia Mine (T283). Robert refers to the fact that MDL was paid for equipment used by RKM in that work (Robert 20.11.17 [384]), but does not address the fact that RKM rather than MDL was invited to undertake that work. That matter demonstrates the extent to which work at Cadia had been shifted from MDL to RKM and BPPL by that time. It appears that an alternative method was successfully implemented for that work, which continued in 2012 and 2013, and that a second jaw crusher unit was deployed in respect of that work (Stephen 20.11.17 [562]).

98 By a draft email to Brian dated 1 October 2015, which was later emailed on 11 November 2015, Robert outlined his rationale for RKM's and BPPL's assuming the work at Cadia as follows (Ex J1, B2570):

"Let me explain, yet again, why MDL could not continue at Cadia:

- The contract with Fluor had terminated.
- No further contracts were issued … to any contractor.
- MDL had successfully tendered for an RTA contract worth $2 million.
- MDL did not own enough equipment to be in 2 places at once.

Let me explain, yet again, why RKM and [BPPL] were able to work at Cadia:

- RKM crushed the tail end of the [Fluor] contract at a peppercorn rate to allow MDL equipment to be re-deployed to take up the RTA contract.
- [BPPL] had the equipment available (pursuant to sale) to be able to take the risk of a 'day-hire' arrangement – no contract.

Why didn't MDL have enough equipment:

- Who would invest in additional equipment with no firm contract in place for its utilisation?
- Who would invest in more assets when there had already been talk about separating the businesses?
- [BPPL] could have sold MDL their equipment, but why would MDL take on that risk?"

*Claim against Robert for breach of s 180 of the Corporations Act in respect of the Cadia mine*

99 MDL pleads (FASC [12]) that, in taking any and all of the pleaded steps, and/or in causing MDL to take any and all of the pleaded steps, in respect of the Cadia mine, Robert and Stephen breached their fiduciary duties to MDL and their duties pursuant to ss 180-183 of the *Corporations Act*. The first of these alleged breaches of duty is a breach by Robert of s 180 of the *Corporations Act*, although it is not apparent that this allegation could have succeeded if MDL's other allegations of breach of duty did not. MDL pleads (FASC [2(b)] that Robert, in his capacity as a director of MDL, owed a duty to MDL to exercise his powers and discharge his duties with care and diligence, including pursuant to s 180 of the *Corporations Act*. That section requires a director or other officer of a corporation to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer. The statutory

duty of care and diligence under that section overlaps with directors' duty of care arising at general law. I summarised the applicable principles in *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233; [2014] NSWSC 789 ("*Re Colorado*") at [408] as follows:

> "In *Australian Securities Commission v Gallagher* above at 52–3, Pidgeon J observed that the test whether the statutory duty of care and diligence had been contravened was an objective one, that a director need not exhibit a greater degree of skill in the performance of his or her duties than may reasonably be expected for a person of his or her knowledge and experience, in the relevant circumstances, and that it was relevant to consider the way in which the work of the company was distributed between its directors and other officers, provided that distribution was reasonable. In *Australian Securities and Investments Commission v Adler* above at [372] (upheld by the Court of Appeal in *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504; 179 FLR 1; [2003] NSWCA 131), Santow J noted that the duties imposed by the section are essentially the same as directors' duties at general law; that, in determining whether a director had exercised reasonable care and diligence, the test was what an ordinary person, with the director's knowledge and experience, might be expected to have done in the circumstances if he or she was acting on his or her own behalf; and that the duty of care and diligence would require special vigilance in a situation of potential conflict, requiring scrupulous concern on the part of those officers who become aware of that transaction to ensure that any necessary corporate approvals are obtained and safeguards put in place. That decision has been cited with approval in recent case law, including *Parker v Tucker* (2010) 77 ACSR 525; [2010] FCA 263 at [70] per Gordon J and *Diamond Hill Mining Pty Ltd v Huang Jim Mining Pty Ltd* (2011) 84 ACSR 616; [2011] VSC 288 at [90] per Croft J."

100 A question whether this duty is breached can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question*: Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 450; 11 ACSR 162 at 209; *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [479], aff'd *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52; *Re FAL Healthy Beverages Pty Ltd* [2017] NSWSC 476 at [55]; *Taxa Australia Pty Ltd v G Wang* (2018) 130 ACSR 531; [2018] NSWSC 1412 (from which I have drawn the summary that appears above).

101 It is not necessary to determine this claim, where MDL succeeds in its claims against Robert for breach of ss 181 and 182 of the *Corporations Act* and breach of the no conflict and no profit rules in equity. The issue with Robert's conduct was less, in substance, any lack of care and skill, than a breach of his obligations not to place himself in a conflict between his duty to MDL on the one hand and his duty to RKM and his personal interest on the other, and his duty not to obtain a profit at MDL's expenses without its fully informed consent.

*Claim against Robert for breaches of s 181 and 182 of the Corporations Act and for breach of fiduciary duty in respect of the Cadia mine*

102 MDL also pleads that Robert breached ss 181-182 of the *Corporations Act* and his fiduciary duty as a director of MDL in respect of work done at the Cadia mine. These claims raise similar issues and it is convenient to address them together.

103 MDL pleads (FASC [2(c)] that Robert, in his capacity as a director of MDL, owed a duty to MDL to exercise his powers and discharge his duties in good faith in the best interests of MDL and for a proper purpose, including pursuant to s 181 of the *Corporations Act*. That section requires a director or officer of a corporation to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation and for a proper purpose.

104 There are differing views as to whether any part of that duty is to be assessed by a subjective standard: *Re* Colorado above at [421]; *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75; 118 ACSR 189; [2016] FCA 1552 at [494]; *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307 at [75]; *Australian Securities and Investments Commission v Flugge* (2016) 342 ALR 1; [2016] VSC 779 at [1980]ff; *Vanguard Financial Planners Pty Ltd v Ale* [2018] NSWSC 314 ("*Vanguard*") at [133]. I summarised the relevant principles in respect of that section and the broadly corresponding general law duty in *Re Colorado* above at [419]–[421] as follows:

> "In *Chew v R* (1991) 4 WAR 21; 5 ACSR 473 at 499, Malcolm CJ summarised the requirements of that duty as being that directors (1) must exercise their powers in the interests of the company, and must not misuse or abuse their power; (2) must avoid conflict between their personal interests and those of the company; (3) must not take

advantage of their position to make secret profits; and (4) must not misappropriate the company's assets for themselves.

The case law is divided as to whether a contravention of s 181(1)(a) of the Corporations Act requires that it be established that a director engaged deliberately in conduct which he or she knew was not in the company's best interests: for example, *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574; [2004] NSWCA 448at [245] per McColl JA (with whom Handley and Santow JJA agreed); *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* above at [150], varied on appeal on another point in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* above. In *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157, the Court of Appeal of the Supreme Court of Western Australia unanimously held that the corresponding general law duty to act in good faith in the company's best interests was subjective and would be complied with if directors honestly believed they acted in the company's best interests (at [923] per Lee AJA, at [1988] per Drummond AJA, at [2027], [2772], [2795] per Carr AJA). The alternative view is that a contravention of that limb of s 181 can be established if the law objectively considers that what the director did was improper, even if the director subjectively believed that he or she was acting in the company's best interests: see, for example, *Australian Growth Resources Corporation Pty Ltd (recs and mgrs apptd) v Van Reesema* (1988) 13 ACLR 261at 270–1; 6 ACLC 529 per King CJ; *Mernda Developments Pty Ltd (in liq) v Alamanda Property Investments No 2 Pty Ltd (formerly known as Dollarforce Financial Services Pty Ltd)* (2011) 86 ACSR 277; [2011] VSCA 392 at [32]–[33]. The difference in those approaches does not seem to me to be material for the purposes of this case. The section may be contravened if a director promotes his or her personal interest in a situation where there is a conflict or real or substantial possibility of a conflict between those interests and the company's interests: *Australian Securities and Investments Commission v Adler* above at [735]; *Parker* above at [72].

A contravention of s 181(1)(b) may also be established if a director does not exercise his or her powers for the purpose for which they were conferred or exercised them for an improper purpose, and the bulk of authority indicates that question is to be determined objectively: *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; 14 ACSR 109at 137 per Ipp J (with whom Malcolm CJ and Seaman J agreed); *Australian Securities and Investments Commission v Adler* above at [738]–[739]; *Parker* above at [73]. In *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* above, the majority held that whether a director acts for an improper purpose, for the purposes of the corresponding general law duty, is determined objectively involving an assessment by the Court of what was reasonable in the circumstances (at [933] per Lee AJA, at [1988], [2027], [2073] per Drummond AJA). By contrast, Carr AJA held that the test whether directors had acted for an improper purpose was primarily subjective, although a decision would

be voidable if directors acted in good faith for a purpose that was beyond their powers or for a collateral purpose (at [2923]).”

105 In *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, the Court of Appeal also held that it was open to the Independent Commission Against Corruption to find that the directors had not discharged an obligation to avoid a conflict of interest, in connection with the sale of a flawed asset to a company which would generate a profit for the directors, by withdrawing from the decision-making process. This is ultimately the gravamen of the allegations made in respect of the Cadia mine.

106 MDL also pleads (FASC [2(d)] that Robert, in his capacity as a director of MDL, owed a duty to MDL not to use his position to gain an advantage for himself or someone else or to cause detriment to MDL, including pursuant to s 182 of the *Corporations Act*. That section prohibits a director, secretary, officer or employee of a corporation from improperly using his or her position to gain an advantage for himself or herself or someone else, or cause detriment to the corporation.

107 I summarised of the applicable principles in *Re Colorado* above at [432]–[433] as follows:

> “An objective standard is to be applied in determining what amounts to an improper” use of position, and impropriety is established by a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case”: *R v Byrnes* above at 514–15 per Brennan, Deane, Toohey and Gaudron JJ; *R v Towey* (1996) 21 ACSR 46 at 57; 132 FLR 434 per Gleeson CJ (with whom Allen and James JJ agreed). In *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18; 223 ALR 218; 56 ACSR 159; [2005] HCA 78, the High Court observed (at [35]) that the relevant conduct would be improper if it amounted to:
>
> > “a breach of the standards of conduct that would be expected of a person in [the director’s] position by reasonable persons with knowledge of the duties, powers and authority of his position as director, and the circumstances of the case, including the commercial context.”
>
> It is not necessary that the relevant director gain an advantage for himself or herself or cause a detriment to the company in order to establish a contravention of the section: *Chew v R* (1992) 173 CLR 626 at 633; 107 ALR 171 at 174; 7 ACSR 481 at 484 per Mason CJ,

> Brennan, Gaudron and McHugh JJ. An objective test was also applied to determine whether this section was contravened in *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* above and, in *Hydrocool Pty Ltd v Hepburn (No 4)* (2011) 279 ALR 646; 83 ACSR 652; [2011] FCA 495, Siopsis J followed *R v Byrnes*, above, in holding that impropriety for the purposes of this section was objective and did not require subjective knowledge of impropriety and followed *Chew v R*, above, in holding that a contravention could be established although the desired object was not achieved. …"

108 MDL also pleads a breach by Robert of the no conflict and no profit rules. MDL pleads (FASC [2(f)] that Robert, in his capacity as a director of MDL, owed fiduciary duties to MDL not to place himself in a position where his personal interest conflicted with his duties and obligations to MDL; and not to profit personally and not to permit any other persons or entities (other than MDL) to profit from his use of his fiduciary position or to profit from any opportunity or knowledge obtained by him as a result of his fiduciary position vis-à-vis MDL.

109 A director of a company is a recognised category of fiduciary and the "no profit" and "no conflict" rules apply to a director as a status-based fiduciary. The no profit rule provides that a fiduciary cannot obtain a profit from its fiduciary position without the principal's consent. The no conflict rule requires that a fiduciary cannot have a personal interest or duty owed to a third party which gives rise to a real and sensible possibility of a conflict. The two rules may overlap, as the case law illustrates: *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46; [1967] 3 WLR 1009, where Lord Upjohn (dissenting) observed that the "relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict" and formulated the test for whether a conflict exists as whether a: "reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict." That passage was approved in *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 at 3 and in *Hospital*

*Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103; [1984] HCA 64.

110 In *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; [1984] HCA 36, Deane J observed that the equitable rule involved two themes and that:

> "The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the "use of fiduciary position" doctrine is but an illustration or part of a wider "conflict of interest and duty" doctrine (see, eg, *Boardman v Phipps*; *N.Z. Netherlands Society "Oranje" Inc v Kuys*), the two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it."

111 In *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558; [1995] HCA 18, in respect of a claim by an employer against a former senior executive, the High Court observed that:

> "A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position. The stringent rule that the fiduciary cannot profit from his trust is said to have two purposes: (1) that the fiduciary must account for what has been acquired at the expense of the trust, and (2) to ensure that fiduciaries generally conduct themselves "at a level higher than that trodden by the crowd". The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage."

112 In opening, Mr Bedrossian also refers to the observation of Ward J in *Vadori v AAV Plumbing* (2010) 77 ACSR 616; [2010] NSWSC 274 at [198] that:

> "Where a fiduciary makes a profit by reason of or as a result of his or her fiduciary position, the fiduciary should be liable to account for this profit, regardless of whether there is a concurrent breach of the duty to avoid a conflict."

113 In *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291; 82 ACSR 1; [2011] WASCA 17, McLure P (with whom Buss JA agreed) observed that a fiduciary is under an obligation, without informed consent, not to promote his or her personal interest by making or pursuing a gain or benefit in circumstances in which there is a conflict or a real or substantial possibility of a conflict between the fiduciary's personal interest and those whom he or she is bound to protect. Her Honour also observed at [76] that:

> "When examining the case law, a distinction needs to be drawn between those cases in which the fiduciary was under a positive duty to acquire or seek to acquire a particular benefit or property for the company (*Cook v Deeks* [1916] 1 AC 554; *Chan v Zacharia*; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *Keech v Sandford* (1726) 25 ER 223) and cases where there is no such positive duty. This case falls into the latter category. Whether there is a sufficient connection in those circumstances can give rise to difficult questions of fact. Indeed, where a complex course of dealing is in issue, as in this case, minds reasonably may differ as to the outcome of the application of the principles: *Maguire v Makaronis* (468). The principles in this area of the law are easier to state than to apply."

114 In *Coope v LCM Litigation Fund Pty Ltd* (2016) 333 ALR 524; [2016] NSWCA 37, Payne JA (with whom Gleeson and Leeming JJA agreed) summarised the no conflict and no profit rules as follows (at [105]):

> "A fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is a conflict, or a real or substantial possibility of a conflict, between the personal interest of the fiduciary and those to whom the duty is owed … A conflict arises if there is a real and sensible possibility that the personal interests of the fiduciary divide the loyalty of the fiduciary with the result that he or she could not properly discharge their duties to the beneficiary. …:" [citations omitted]

115 In *Chickabo Pty Ltd v Zphere Pty Ltd* (2019) 57 VR 406; [2019] VSC 73 at [62], Sifris J summarised the scope of the "no conflict" rule, and the considerations which underlie as follows:

> "The first of a fiduciary's obligations has been described as the 'no conflict' rule. A fiduciary is not permitted to enter into engagements 'in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect'. In circumstances involving breach of the rule, the rule operates to appropriate for the beneficiary any benefit or gain obtained where there existed a conflict of personal interest and fiduciary duty, or a significant possibility of such a conflict. This precludes the fiduciary from being swayed by considerations of personal interest, thus reinforcing absolute loyalty to the beneficiary. The unconscionability which is said to justify the availability of equitable relief does not lie with the receipt by the fiduciary of the benefit or gain, as with the retention by the fiduciary of the benefit which 'in conscience ought to be disgorged to the principal'."

116 It is important also to recognise that a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 409; [1929] ALR 273 at 284; [1929] HCA 24 per Dixon J; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; 86 ACSR 674; [2011] FCAFC 166 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case" as "fundamental"; *Colorado* above at [361]; *Re Pages Property Pty Ltd* [2020] NSWSC 1270 at [45].

117 In *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22; 87 ACSR 260; [2012] FCAFC 6, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed (at [179] that:

> "The concept of "duty" in the "conflict of duty and interest" formula of the first of these [themes] is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary's discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines "[t]he subject matter over which the

> fiduciary obligations extend" for conflict of duty and interest and conflict of duty and duty purposes."

118 In *Howard v Commissioner of Taxation* (2014) 309 ALR 1; [2014] HCA 21, French CJ and Keane JJ in turn referred (at [34]) to the principle that:

> "The scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship."

Their Honours also noted, with reference to authority, that such a duty is to be "moulded according to the nature of the relationship and the facts of the case". Gageler J (at [110]) there referred with approval to the observation in *Grimaldi v Chameleon Mining NL (No 2)* above to which I have referred above.

119 This principle can in turn overlap with principles of waiver and ratification, summarised by Tracey J in *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* (2011) 86 ACSR 393; [2011] FCA 1154 at [92] (varied on appeal on another point in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418; 93 ACSR 76; [2013] FCAFC 16 as having effect that:

> "A breach may be avoided if the fiduciary makes a full and frank disclosure of the facts to the person to whom the duty is owed and that person consents to the fiduciary acting in a way that would otherwise place him or her in a position of conflict. Disclosure and consent may also retrospectively excuse a breach which has already occurred."

I have drawn on my judgments in *Colorado* above at [351] and *Re Pages Property Pty Ltd* above at [43]ff for the analysis which appears above.

120 I now turn to the case law that addresses the application of the no conflict and no profit rules in respect of the diversion of a "corporate opportunity". In *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110 at 138, Hill J summarised the state of the law relating to the diversion of corporate opportunity as being that:

> "a fiduciary must account for a profit or benefit if that profit or benefit was obtained either where there was a conflict or possible conflict between his fiduciary duty and his personal interest, or, where that profit or benefit was obtained, by reason of his fiduciary position or by reason of his taking advantage of an opportunity or knowledge derived from that fiduciary position".

121 In *SEA Food International Pty Ltd v Lam* (1998) 16 ACLC 552 at 557, Cooper J observed that:

> "What is to be drawn from the authorities is that a director will act in breach of his fiduciary obligations to a company (the scope of which will vary in the circumstances of each particular case) if he or she takes up an opportunity for profit where there is a sufficient temporal and causal connection between the obligation and the opportunity. What is a sufficient connection will depend, in any particular case, upon a number of factors, including the circumstances in which the opportunity arises and the nature of it and the nature and extent of the company's operations and anticipated future operations."

122 In *Streeter v Western Areas Exploration Pty Ltd (No 2)* above, the majority (Murphy JA dissenting on this point, but agreeing in the result) held that there was no conflict between a director's and a company's interests where there was no positive duty for a director to seek out an opportunity which was outside the actual or intended line of the company's business.

123 In *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1; (2012) 292 ALR 382; (2012) 90 ACSR 288; [2012] FCA 634, the plaintiff ("LGT") operated a golf course on land owned by the defendant and leased to LGT. The defendant owned an adjoining piece of land ("Lost Farm") on which he developed a second golf course, commencing that development of the second golf course while he was a director of LGT. Jessup J dismissed LGT's claim for breach of fiduciary duty, and held that LGT never contemplated that it would participate in the development of Lost Farm, despite knowing of the development. He held that taking up the opportunity to develop Lost Farm was not within the scope of the defendant's fiduciary duties, and there was no reasonable possibility of a conflict between the defendant's responsibilities as a director of LGT, and his personal interest in developing his land as a golf course. The decision was referred to, without disapproval, by the Court of Appeal in *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2016) 340 ALR 580; (2016) 116 ACSR 566; [2016] NSWCA 347 at [171]ff.

124 Mr Bedrossian invokes the conflict of interest and no profit rules and corporate opportunity principles to establish liability on Robert's part in respect of the work at the Cadia mine. He submits that MDL's performance of crushing and drilling work at sites (including mine sites) owned by third parties such as CVO, together with the hiring of equipment for use by third parties, was a material component of MDL's business up to and including the 2010 financial year; that

MDL's relationship with Cadia was, in and of itself, an important and growing component of MDL's business and revenue stream during the 2007 to 2010 financial years; and that Robert (and Stephen, RKM and BPPL) used that foundation to sub-contract work away from MDL and/or secure further contracts and further work at the Cadia mine for RKM and BPPL. Mr Bedrossian also submits that the decisions concerning the performance of the works performed for CVO, including those circumstances and occasions when RKM and BPPL obtained the benefit of the revenue or profit from those opportunities (either via MDL or directly from Cadia), were made by Robert (and/or Stephen) and, to the extent that Cadia work was performed by either RKM or BPPL, that served only to benefit Robert, Stephen and entities associated with them and disadvantage and financially injure MDL (and, by extension, Brian). In oral closing submissions (T555), Mr Bedrossian submitted that the no conflict and no profit rules were the primary basis upon which the first derivative proceedings are pursued against Robert (and Stephen) although not abandoning the statutory claims and that Robert (and Stephen):

> "were in a conflicted position. They had the opportunity and they were called upon to make a decision as to whether to permit or facilitate MDL profiting, or potentially profiting from its pursuit of the Cadia work, but chose to take a different path."

125 The Robert Murdoch Interests' primary answer to this claim appears to be that the duties owed by Robert (and Stephen) to MDL were narrowed so as to permit RKM and BPPL to undertake the Cadia work. In a lengthy section of the Defence (Defence [4AA]), the Robert Murdoch Interests plead, variously, the circumstances in which MDL was established and Robert's asserted contribution and Brian's asserted lack of contribution to MDL; Robert's role as managing director of MDL and associated entities and his contribution to its financial performance; the fact that Brian performed manual work and supervisory functions at the quarries, which is implicitly characterised as less worthy than Robert's contribution to the companies; the operation of MDL as a "family partnership" comprising Robert, Brian and their respective sons, until November 2009 when it is suggested that MDL ceased to operate in that way by reason of earlier events and a meeting at which it was allegedly resolved to split up MDL, with the alleged result (Defence [4AA(m))] that:

> "In the circumstances, as from at least 20 November 2009, it was the intention understanding and assumption of [Robert] and [MDL], and/or the intention understanding and assumption of [Robert], [MDL], [Stephen], Brian Murdoch and Scott Murdoch that the assumed basis for the operation of [MDL] as a family partnership … had come to an end, that [MDL] and other jointly owned companies were to be split up and that the [Robert] and [Stephen] and Brian and Scott Murdoch were free to pursue new business opportunities, including business opportunities of the same or similar type carried out by the Plaintiff up to that time, independently."

126 The Robert Murdoch Interests in turn plead (Defence [4BB]) that:

> "By reason of the matters in paragraphs 4AA, the [Robert Murdoch Interests] deny that any of the obligations or duties pleaded in the Further Amended Statement of Claim precluded them, as from November 2009 from pursuing business opportunities in their own right, including any of the transactions referred to [respect of the Cadia mine operations, the swamped crushers Timboon lime quarry and Buckaroo Road property].

127 Mr Kelly submits that the scope of any fiduciary duty owed to MDL by Brian, Robert, Scott and Stephen and the scope of any statutory duty imposed by ss 180-183 of the *Act* were narrowed by the arrangements made when Scott and Stephen took up interests as shareholders in MSC, giving rise to a suggested "de facto" family partnership which it is suggested would allow members of the family to "go their own way". It seems to me that there was nothing in those arrangements which narrowed the scope of Robert's duties owed to MDL to permit the diversion of work from MDL to his and Stephen's associated entities, or to permit Robert to make decisions for both MDL on the one hand and RKM or BPPL in the other when they were in opposite interests in respect of the terms of any subcontracting or hire arrangement for work and equipment at the Cadia mine.

128 Mr Kelly also submits that Robert's duties are informed by cl 17.4 of MDL's constitution, which provides that a director is not disqualified from contracting with MDL, and a contract or arrangement entered into by MDL in which a director is interested will not be avoided, nor will the director be liable to account to MDL for any profit arising, but the nature of the director's interest must be disclosed by the director in the manner required by the corporations law. Mr Kelly also submits, and I accept, that formal disclosure of an interest in a transaction may not be required where it is already known to other directors.

These propositions also do not assist the Robert Murdoch Interests, where I find below that Robert did not make full and fair disclosure of his interest in dealings between RKM and MDL at any relevant time, and I have not found that the nature of that interest was known by Brian at the relevant times. Mr Kelly also submits that, on that basis, Brian, Robert, Scott and Stephen were entitled to manage the business and affairs of their respect companies as independent operating companies including carrying on whatever business they think fit. That proposition does not have the consequence that directors or officers of MDL are at liberty to assume business opportunities of MDL in their personal companies. I return to the Robert Murdoch Interests' overlapping affirmative defence of consent and estoppel in respect of the Cadia mine below.

129 Mr Kelly submits that, if the fiduciary and other duties of Robert (and Stephen) were not narrowed as the Robert Murdoch Interests contend, any question of conflict should be considered on a "transaction by transaction" basis to determine whether there was any real and sensible possibility of conflict. I do not accept that submission. Robert's making decisions, for MDL, that deprived MDL of work and income and advantaged RKM and BPPL involved both a real and sensible conflict of interest and a breach of the no conflict rule, and it is not to the point to speculate whether a transaction would have been objectively justifiable (if a conflict had not existed) or whether a director who did not face that conflict may have reached a similar decision. Mr Kelly also submits that there was no real or serious conflict in each decision by MDL to hire equipment from RKM or BPPL in respect of the work at Cadia, because "there was a common interest in work being done and money being made for both parties at Cadia". It seems to me that that submission is plainly incorrect. There was an obvious conflict of interest in that position, because Robert was deciding the price to be paid to hire the equipment, both for MDL as the party hiring it which had an interest in minimising the hire fees paid so as to maximise its profit on the Cadia work and for RWM as lessor, which had an interest in maximising the hire fee payable so as to maximise its profit on the work, at the cost of MDL. It is not necessary to establish that the price paid was not an arms'

length price in order to establish a breach of the no conflict rule and the no profit rule in that situation.

130 I also do not accept Mr Kelly's submission that it was necessary for Mr Bedrossian to put that the price of the transactions or each of them was not an arms' length price to Robert, where the conflict of interest and breach of statutory duty involved in the transactions was squarely put to him, to the extent that I considered it necessary to give him a self-incrimination warning under the *Evidence Act* in that respect. It is also not necessary to pursue the, possibly controversial, question raised by Mr Kelly in submissions whether a breach of duty can be established only by the fact that a director is in a position of conflict of duty and interest or duty and duty, or requires also that he or she pursue that duty. Here, Robert acted so as to advance that conflict in causing MDL to subcontract work to or hire equipment from RKM or BPPL and deciding the terms of the transactions including the price to be paid by MDL to hire the equipment from RKM or BPPL. That conflict existed irrespective of the result of that decision, although its significance is emphasised by the amount of the revenue and profits derived by RKM and BPPL as a result of those actions, which I address below.

131 I am satisfied that Robert acted in plain conflict of interest, in breach of the no conflict rule and in breach of ss 181-182 of the *Corporations Act* in the dealings between MDL and RKM and BPPL in the first aspect of the Cadia work and in the dealings with CVO in the second aspect of the Cadia work. Subject to the affirmative defences raised by the Robert Murdoch Interests which I address below, these claims are established.

*Claim against Robert for breach of s 183 of the Corporations Act*

132 For completeness, MDL also pleads a breach by Robert of s 183 of the *Corporations Act.* MDL pleads (FASC [2(e)] that Robert, in his capacity as a director of MDL, owed a duty to MDL not to use improperly information obtained as a director of MDL to gain an advantage for himself or someone else or to cause detriment to MDL, including pursuant to s 183 of the *Corporations Act*. This claim adds nothing to the other claims that I have addressed above and it is not necessary to determine it.

*Claims against Stephen in respect of work done at the Cadia mine*

133 As I noted above, MDL pleads (FASC [3]) that Stephen is and was, at least from 2009 to 2014 and from October 2016, employed as a senior manager by MDL and was, thereby, an officer of MDL within the meaning of that term as defined in s 9 of the *Corporations Act* and for the purposes of ss 180, 181, 182 and 183; that, in his capacity as an officer of MDL, he owed a duty to MDL to exercise his powers and discharge his duties with care and diligence, including pursuant to s 180 of the *Corporations Act*; a duty to MDL to exercise his powers and discharge his duties in good faith in the best interests of MDL and for a proper purpose, including under s 181 of the *Corporations Act*; a duty to MDL not to use his position to gain an advantage for himself or someone else or to cause detriment to MDL, including under s 182 of the *Corporations Act*; and a duty to MDL not to use improperly information obtained as an officer of MDL to gain an advantage for himself or someone else or to cause detriment to MDL, including under s 183 of the *Corporations Act*. I have addressed the content of those duties above.

134 A person may be an "officer" of a company where he or she makes or participates in making decisions that affect the whole or a substantial part of MDL's business, or had the capacity to affect significantly its financial standing: see *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; 62 ACSR 427; [2007] FCA 963 at [490]; *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; [2010] NSWCA 331 at [893]; *Shafron v Australian Securities and Investments Commission* (2012) 286 ALR 612; 88 ACSR 126; [2012] HCA 18. Mr Bedrossian submits, and I of course accept, that whether a person is an "officer" within the meaning of s 9(b) of the *Corporations Act* is not determined only by reference to the person's title or the name of their particular office*: Australian Securities and Investments Commission v King* [2020] 94 ALJR 293; [2020] HCA 4 at [48]-[59].

135 It is common ground that Stephen was production manager of MDL, and subordinate at least to Robert as director, shareholder and MDL's general manager and to Brian as the other director, shareholder and MDL's operations

manager. The evidence indicates he was responsible, by statute, for safety issues in that capacity; he also made allocation decisions in respect of heavy machinery, although plainly in consultation with others including at least Robert, possibly Brian and site managers; he had the authority to acquire expensive equipment for the company, again likely in consultation with others; and he likely had a degree of greater influence so far as he was one of the two sons in the founding family of MDL.

136 In opening submissions, Mr Bedrossian submitted that Stephen was part of MDL's senior management team and the seniority of his role "including his participation in making important business decisions" gave him the capacity to affect significantly MDL's financial standing and had the result that he was a statutory officer of MDL. In closing oral submissions, Mr Kelly accepted that Stephen should be treated as a statutory officer of MDL during the period in which he was employed by MDL as its production manager. I proceed on the basis of that concession.

137 MDL pleads that Stephen, in his capacity as an officer and employee of MDL, owed fiduciary duties to MDL, namely not to place himself in a position where his personal interest conflicted with his duties and obligations to MDL and not to profit personally and not to permit any other persons or entities (other than MDL) to profit from his use of his fiduciary position or to profit from any opportunity or knowledge obtained by him as a result of his fiduciary position vis-à-vis MDL. MDL also pleads that Stephen, while he was an officer or an employee of MDL, owed to MDL express or implied contractual duties not to use information obtained or opportunities arising by reason of his position as an officer or employee of MDL to profit personally or not permit any other persons or entities (other than MDL) to profit or to cause detriment to MDL.

138 An officer or senior employee of a company may owe a fiduciary duty to the company, and be subject to the rule against conflict of interest and the no profit rules: *Green v Bestobell Industries Pty Ltd* [1982] WAR 1; (1982) 1 ACLC 1. Generally, an employee also owes an implied duty of good faith and fidelity to his or her employer not to engage in conduct which impedes the faithful performance of her obligations, or is destructive of the necessary confidence

between employer and employee: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; 312 ALR 356; [2014] HCA 32 at [30] (French CJ, Bell and Keane JJ), [63]–[66] (Kiefel J). In *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487; [2002] NSWSC 33 at [20]ff (varied in respect of other matters in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; 197 ALR 626; 44 ACSR 390; [2003] NSWCA 10), Palmer J observed that:

> "An employee has a duty to act in the interests of the employer with good faith and fidelity. That duty is implied in every contract of employment if it is not otherwise imposed by an express term. In addition, the duty is imposed upon every employee by the law of fiduciaries, the relationship of employer and employee being recognised as a paradigmatic fiduciary relationship.
>
> The obligations imposed by the duty are not coterminous with the employee's normal working hours: they govern all the activities of the employee, whenever undertaken, which are within the sphere of the employer's business operations and which could materially affect the employer's business interests. Whether a particular activity could materially affect the employer's business interests is a question of fact and degree.
>
> The duty of loyalty requires that an employee not place himself or herself in a position in which the employee's own interest in a transaction within the sphere of the employer's business operations conflicts with the employee's duty to act solely in the employer's interest in relation to that transaction. A fortiori, an employee may not take for himself or herself an opportunity within the sphere of the employee's business operations without the employer's fully informed consent. …
>
> The remedy for breach of the contractual duty of loyalty is damages. The remedy for breach of the fiduciary duty of loyalty is either an account of the profits derived by the employee from the breach or equitable compensation. The employer need not elect between these remedies until the time at which judgment is to be entered. …"

139 I am satisfied that, for the same reasons Robert breached his statutory and fiduciary duties owed to MDL, Stephen breached ss 181-182 of the *Corporations Act* and his fiduciary and statutory duties in the period up to his resignation from MDL, so far as the evidence to which I have referred above demonstrates that he was party with Robert to diverting the Cadia work from MDL to RKM and BPPL. It is not necessary to determine whether his fiduciary duties continued beyond his resignation as production manager of MDL in February 2014, where the acts that give rise to his liability and to any relief against him substantially took place before that date.

140 MDL similarly pleads (FASC [20]) that the pleaded conduct in respect of the Cadia mine site beginning in FY 2012 involved a breach of Robert's and Stephen's fiduciary duties to MDL and their respective duties pursuant to ss 180-183 of the *Corporations Act*. These claims are established for the same reasons as the claims for the earlier period, subject to the affirmative defences raised by the Robert Murdoch Interests, to which I now turn.

*The Robert Murdoch Interests' defence of consent in respect of the Cadia mine*

141 The Robert Murdoch Interests plead (Defence [12]) that, in May 2010, Brian and Robert had a conversation in which Brian gave oral consent to the performance of the "emergency ROM pad" [Cadia] works by a mixture of machinery owned by [MDL] and [RKM] and [BPPL]. I first turn to the matters which would need to be established in respect of a defence of fully informed consent to the conduct of Robert and Stephen, and their associated companies RKM and BPPL, in respect of the Cadia mine. In *Maguire v Makaronis* (1997) 188 CLR 449 at [455], the majority of the High Court observed that what is required for fully informed consent is a "question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given". The plurality of the High Court also observed, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [107] that consent can be established "at different times and in different ways", and what is required will depend on the sophistication and intelligence of the persons to whom disclosure was made. Mr Bedrossian also referred, in closing submissions, to my summary of the matters necessary to establish "informed consent" in *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* (No 9) [2012] NSWSC 984 at [153]-[160] and also pointed out, by reference to authority, that consent is not an absolute defence to a breach of fiduciary duty, but is relevant to whether it would be fair and equitable to allow the plaintiff to pursue the claim for breach: *Spellson v George* (1992) 26 NSWLR 666 at 669, 674-675; *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9)* above at [161]ff. Mr Bedrossian submits that fully informed consent would require at least that Brian had been provided with full disclosure of the facts and of "all material circumstances, including the character of the transactions and the nature of the relevant conflict": *Colorado Products* above at [381]; *Re FAL*

*Healthy Beverages Pty Ltd* above at [119]-[120]. I accept that formulation of the standard.

142 This defence appears to rely on the conversation set out in paragraph 325 of Robert's affidavit dated 20 November 2017. Robert there refers in his first affidavit to a conversation with Brian in mid to late 2010 where Brian asked why Stephen was putting "his crusher" into Cadia, and Robert responded that there was an emergency and that MDL did not have "any other gear". In his second affidavit, Brian denies that conversation and denies knowing anything about Stephen "owning a crusher" or operating it at Cadia (Brian 28.3.18 [17]). As Mr Bedrossian points out, that conversation did not amount to consent by Brian to the relevant work, where it made plain that Brian then understood that the crusher being used at Cadia was Stephen's, rather than RKM's; and where it amounted to Robert asserting the justification for the use of the crusher, without disclosing that it was RKM's crusher, and did not involve any acceptance of that proposition by Brian. I will also address the other evidence as to this issue, before turning to the parties' submissions.

143 Brian's evidence is that, in March 2012, he heard from several staff members of the Murdoch Group that a crusher owned by Stephen and other plant and equipment owned or controlled by RKM, Robert, Stephen or BPPL was being operated at the Cadia mine site (Brian 6.7.17 [105]). In fact, that equipment was owned by RKM, although it was, for a period of time, purportedly leased by BPPL (which did not own it) to MDL for use at the Cadia site. Brian's evidence is that he was not asked by Robert to approve or consent to the conduct of work, the subcontracting of work or the tender for work at the Cadia mine site by Robert, Stephen, RKM or BPPL (Brian 6.7.17 [109]); and he gave evidence (admitted with a limiting order under s 136 of the *Evidence Act*, as to his understanding) that Robert had not "disclose[d]" that RKM, or Robert in his personal capacity, carried out work at that site. Brian also denies that he became aware that RKM and BPPL had performed work at Cadia by 2010, and again says that it was not until late 2012 that he became aware of who "actually owned the equipment that was out at Cadia" (Brian 28.3.18 [20]). It appears that, even in 2012, Brian was not made aware of the true position as

to ownership of that equipment, by RKM, or the arrangements involving RKM and BPPL by which it was used at Cadia.

144 Brian was cross-examined to establish that, and it was apparent that, he had some general knowledge that Stephen was working at the Cadia mine at some point (T165ff) and he accepted in cross-examination that Scott had raised his concern with Brian in April 2011 that a significant amount of money had been paid out of MDL in respect of the Cadia work (T179ff). He was also cross-examined to establish that, between April 2011 and November 2011, he knew that Stephen was doing work at Cadia (T182), but that knowledge plainly did not extend to the arrangements by which RKM and BPPL were working at the Cadia mine, still less to the financial aspects of the transactions. Brian's evidence in cross-examination was also that he was aware in March 2012 that Stephen was still doing crushing work at Cadia, because staff were saying the machines were over there; he accepted that he was aware that BPPL was Stephen's company and he would be conducting his business through it, although observing that Stephen "shouldn't have had his company in a job that was acceptable for MDL to do" and that Brian was not aware that RKM was also doing work at Cadia, and had no information about that company (T225). Brian's knowledge of that matter falls well short of what would be required to limit any duties owed by Robert or Stephen, or amount to ratification or waiver of any breach of duty by them.

145 The Robert Murdoch Interests submit, relying on with reference to *Spellson v George* above at 669-670 that MDL gave all necessary consent to RKM and BPPL performing the Cardia work, by standing by with knowledge and allowing the course of conduct to take place. That proposition can be rejected simply, because there was not sufficient disclosure to Brian, or MDL, to support the application of that principle.

146 Mr Kelly also submits that, from November 2009, all parties assumed that the de facto partnership was at an end and they were free to pursue independent opportunities including in relation to business of the same type as carried on by MDL and in competition with MDL. I do not accept that submission, where it is apparent that all parties understood that the separation of their interests

discussed in November 2009 had not yet been implemented, and that MDL was carrying on its business on an ongoing basis unless and until that separation was implemented. Although the parties did not refer to it, and it is not necessary to my decision, a breach of the conflicts rule was established in similar situation in the leading English decision in *Bhullar v Bhullar* (2003) BCC 711; [2003] EWCA Civ 424 where a director of a company purchased a property through a separate company, notwithstanding the two families which had established the first company were then negotiating to divide the company's assets between themselves.

147 In closing submissions, Mr Kelly also submits that Brian knew that:

> "Stephen was doing work at Cadia on his own account (be it by BPPL or RKM) as did Robert, and by their words and conduct, including standing by with knowledge and allowing MDL to participate and benefit from that work, MDL gave all necessary consent to the doing of that work".

That submission is supported by a detailed review of the relevant evidence, which I have summarised above. The reference to Robert and Stephen doing work at Cadia reflects an approach that was frequently taken in the Robert Murdoch Interests and in submissions. That elision between those individuals and RKM and BPPL emphasises the extent to which those companies were regarded as the alter egos of Robert and Stephen respectively, a matter to which I will return below in respect of the question of remedy. However, knowledge that the individuals were working on the Cadia site plainly did not amount to knowledge of the basis and terms on which those companies were doing so.

148 It seems to me that Robert and Stephen did not, even on their own evidence, make full and frank disclosure as to the use of RKM's equipment and BPPL's role at the Cadia site, still less of the financial aspects of the transactions, or seek or obtain Brian's consent to their conduct. The disclosure given by them, or any suspicions which Brian or Scott may have had as to Cadia, did not amount to full and fair disclosure in respect of the Cardia opportunity. I am satisfied that MDL, and Brian, had not given fully informed consent to RKM's and BPPL's activities in this regard.

*The Robert Murdoch Interests' estoppel defence*

149 The Robert Murdoch Interests also plead (Defence [4D]) that MDL is estopped from denying that Robert and Stephen were entitled to pursue business opportunities in their own right after November 2009 including the specified transactions; that (Defence [4E]) MDL created an assumption that MDL and other companies were to be divided and Robert, Stephen, Brian and Scott were free to pursue new business opportunities "including business opportunities of the same or a similar type carried on by [MDL] up to that time"; and (Defence [4F]) that Brian and Scott had also pursued such opportunities and MDL had failed to take action against them, a proposition that disregarded the Second Derivative Action which I will address below. The Robert Murdoch Interests repeat an estoppel claim (Defence [4L]).

150 Mr Kelly referred to the observations of Brereton J in *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 at [32], in contending that either an estoppel by convention or an equitable promissory estoppel arose; he then submits that the assumption related to the private rights of the parties and no question as to a conventional estoppel arise; and that the estoppel should be characterised as a proprietary estoppel or estoppel by acquiescence. To the extent that any question of promissory estoppel arises, the applicable principles were summarised in *Waltons Stores (Interstate) Ltd v Maher* (1998) 164 CLR 387 at 428-429, and those applicable to a conventional estoppel were applied by the Court of Appeal in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603; [2007] NSWCA 65 at [200]. I also bear in mind Ball J's summary of the applicable principles and the differences between the relevant forms of estoppel in *Twigg v Twigg (No 4); Lambert v Twigg Investments Pty Ltd (No 3)* [2020] NSWSC 1159 at [147]-[149]. Mr Kelly submitted that the course of conduct between the parties gave rise to an estoppel by which MDL was estopped from denying that the Robert Murdoch Interests were entitled to pursue business opportunities in their own right including the matters complained of in the first derivative proceedings. With respect, that submission does not adequately recognise the real distinction between an entitlement to pursue business opportunities in a company's own right and an entitlement to divert opportunities from one company to another.

151 The Robert Murdoch Interests' estoppel case appears to depend on the resolution they contend was passed at the November 2009 meeting, or possibly an agreement reached at that meeting, but the basis for that resolution or agreement is not established given the limited character of the discussion on that date, which I have noted above. Mr Bedrossian also rightly points out that a number of the factual matters on which the Robert Murdoch Interests rely, to support the estoppel, postdate the steps taken by Robert and Stephen in respect of the diversion of revenue from Cadia, and are at least equally consistent with a breach of duty as with any estoppel. Mr Bedrossian also submits, and I accept, that reliance on estoppel or waiver by the Robert Murdoch Interests does not take matters further, because an estoppel or waiver would only arise if there was full and frank disclosure of relevant matters to Brian or MDL, by its directors: *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* (2011) 86 ACSR 393; [2011] FCA 1154 at [92], [126]-[138]. An estoppel is not established in respect of the claim in respect of the Cadia mine, where the relevant matters were not fully and fairly disclosed to Brian, or MDL through him, and the element of unconscionability would not be established so as to support an estoppel. I note, for completeness, that the Robert Murdoch Interests also rely on s 1322 of the *Act* in respect of the "resolution" passed on 20 November 2009, but that section does not assist them. The events on that date were not a resolution passed, involving an irregularity, but a discussion, and do not fall within the scope of that section.

*The Robert Murdoch Interests' claim for just allowances*

152 The Robert Murdoch Interests claim just allowances if they are liable to an account of profits (Defence [4M]). Mr Bedrossian accepted, in opening submissions, that it may be inequitable for a fiduciary to be required to account for its entire profits acquired from a breach of duty, if those profits are not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources: *Warman International Ltd v Dwyer* above at 561. I also bear in mind that considerations as to whether the fiduciary acted honestly or dishonestly, and how it has been remunerated, and the risk that has been borne by the principal are relevant: *Grimaldi v Chameleon Mining NL (No 2)* above at [531]. I also have regard to Ball J's

summary of the applicable principles in *Twigg v Twigg (No 4); Lambert v Twigg Investments Pty Ltd (No 3)* above.

153 There are also several cases where such an allowance for skill and effort has not been allowed: *Guinness Plc v Saunders* [1990] 2 AC 663 at 694; *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584 at 596. In *Harris v Digital Pulse Pty Ltd* above, Heydon JA observed that a defendant who sought an allowance for skill and diligence had the onus of negativing dishonesty or other grave misconduct to permit such an allowance. In *Calvo v Sweeney* [2009] NSWSC 719, White J (as his Honour then was) declined to make relief conditional on an allowance for a defaulting accountant's efforts, and observed (at [272]) that such a condition was discretionary and could be refused where a fiduciary had been guilty of bad faith, and held that such an allowance should not be made where there was a conflict between the accountant's interest and duty and the accountant had taken advantage of the plaintiffs and not dealt fairly with them.

154 The Robert Murdoch Interests submit that allowances should be made, or more precisely any account of profits in favour of MDL should be limited, because Brian had stood by or could have identified the relevant conduct by making further inquiries of Robert or of Mr Portelli. I have addressed that position above in dealing with the Robert Murdoch Interests' defences of consent and estoppel, and with the claim for account of profits, and it does not seem to me that those matters either support a claim for just allowances or limit the period for which an account of profit should be allowed. The Robert Murdoch Interests also submit that the provision of mobile crushing services and equipment to the mining industry involves risk and an allowance should be made on that basis. I am not persuaded that the risk involved in the provision of those services, particularly where RKM and BPPL had the advantage of their long experience of MDL's provision of such services, warrants any such allowance. Next, the Robert Murdoch Interests submit that the alleged breach of fiduciary duty allowed MDL to make a profit that it would not otherwise have done, by deploying its machinery in conjunction with RKM's machinery. I do not accept that submission, where it assumes, without evidence, that MDL could not have made the profit for itself by, for example, purchasing the equipment from a third party or hiring the equipment from a third party at what may or may not have

been the same rates as it was hired from RKM. That matter also does not support an allowance.

155 It does not seem to me that a sufficient basis is established for an allowance based on skill, efforts, property or resources in respect of the diversion of profits to RKM and BPPL in respect of the Cadia work. RKM and BPPL performed work at the Cadia site using similar equipment, staff and methods to those which MDL would have adopted, had the work not been diverted from it to them, as to which MDL would have retained the entire profit. I would also decline that allowance as a matter of discretion, where there was a conflict between Robert's and Stephen's interest and duty and they took advantage of MDL (and, indirectly, of Brian) and I also find below (in dealing with the claims for relief under s 1318 of the *Corporations Act)* that aspects of the conduct involved a lack of honesty.

*Claims for accessorial liability*

156 MDL in turn pleads elaborate possible permutations of the claims against Robert and Stephen that might extend them further. First, MDL pleads (FASC [13(a)]) that, so far as Robert and Stephen were directors of RKM or BPPL at the time that any of the pleaded conduct, Stephen was a person relevantly involved in, for the purposes of s 79 of the *Corporations Act*, Robert's breach of the duties which Robert owed to MDL pursuant to ss 180-183 of the *Corporations Act.* Again repeating that claim in respect of the later work at the Cadia mine, MDL also pleads that (FASC [24]) Stephen was relevantly involved in, for the purposes of s 79 of the *Corporations Act*, Robert's alleged breaches of his statutory duties to MDL. These claims are established since it is plain that Stephen was involved in, and knew all the essential facts of, Robert's breach throughout the relevant period.

157 MDL also pleads (FASC [13(b)]) that Robert was a person relevantly involved, for the purposes of s 79 of the *Corporations Act*, in Stephen's breaches of the duties which Stephen owed to MDL pursuant to ss 180-183 of the *Corporations Act*. In respect of the later work at Cadia, MDL also pleads (FASC [24A]) that Robert was relevantly involved in, for the purposes of s 79 of the *Corporations Act*, Stephen's alleged breaches of his statutory duties to MDL. It is not

necessary to determine this claim which adds nothing to the direct claims advanced against Robert.

158 MDL also pleads (FASC [14]) a claim for involvement under s 79 of the *Corporations Act* against RKM, so far as Robert and Stephen were directors of RKM at the time any of the pleaded conduct. Repeating this pleading in respect of the later work at Cadia, MDL also pleads (FASC [22]) that RKM was relevantly involved in, for the purposes of s 79 of the *Corporations Act*, in the alleged breaches by Robert and/or Stephen of their duties owed to MDL under ss 180-183 of the *Corporations Act.* These claims are established so far as Robert had control of RKM and it knew what he knew and was the beneficiary of the diversion of revenue and work from MDL. It is not necessary to determine any claim in respect of accessorial liability to breach of duties by Stephen which would have no further practical consequence.

159 MDL pleads (FASC [15]) a claim for knowing involvement under s 79 of the *Corporations Act* against BPPL, so far as Stephen was a director of BPPL at the time of the pleaded conduct. Again repeating this pleading in respect of the later work at Cadia, MDL pleads that (FASC [23]) BPPL was relevantly involved in, for the purposes of s 79 of the *Corporations Act*, the alleged breaches by Robert and/or Stephen of their statutory duties owed to MDL. These claims are established so far as Stephen had control of BPPL and it knew what he knew and was the beneficiary of the diversion of revenue and work from MDL. It is not necessary to determine any claim in respect of accessorial liability to breach of duties by Robert which would have no further practical consequence.

160 MDL also pleads (FASC [15A]) a claim for knowing receipt against RKM, so far as Robert and Stephen were directors of RKM at the time any of the pleaded conduct and (FASC [15B]) a claim for knowing receipt against BPPL, so far as Stephen was a director of BPPL at the time of the pleaded conduct. In respect of the later work at Cadia, MDL also pleads (FASC [24B]) a claim for knowing receipt against RKM, so far as Robert and Stephen were directors of RKM at the time any of the pleaded conduct and (FASC [24C]) a claim for knowing

receipt against BPPL, so far as Stephen was a director of BPPL at the time of the pleaded conduct.

161 Mr Kelly submits that RKM and BPPL did not owe fiduciary duties to MDL and any liability on their part must be established by reason of accessorial liability. In opening submissions, Mr Bedrossian accepts that, to be liable for knowing receipt of trust property, it must be shown that the recipient of the property was a recipient of trust property and that they had knowledge of breach of duty. Mr Kelly responds that recipient liability under the first limb of *Barnes v Addy* has not been established because no property of MDL has been shown to have been received by any of the Robert Murdoch Interests. Mr Kelly also submits, in closing submissions, that the benefit which RKM or BPPL are alleged to have received, for the purposes of the allegation of knowing receipt, was not put to Robert or Stephen in cross-examination. There may be force in the Robert Murdoch Interests' submission that RKM and BPPL did not directly receive the proceeds of a breach of fiduciary duty, where they were initially paid for equipment hire by MDL and subsequently received payment directly from CVO in respect of the works provided to it. Mr Kelly also points out that, although a claim for knowing involvement may have been available against RKM and BPPL, that claim was not pleaded.

162 This submission does not assist the Robert Murdoch Interests where RKM and BPPL may be treated as the alter egos of Robert and Stephen respectively, and may be held liable to account on that basis. In closing submissions, Mr Bedrossian referred to the observations of the Full Court of the Federal Court of Australian in *Grimaldi v Chameleon Mining NL (No 2)* above at [242]-[243] in respect of the imposition of liability on an alter ego, as follows:

> "It is accepted in this country that Lord Selborne's ex tempore observations in *Barnes v Addy* did not provide an exhaustive statement of the circumstances in which, and the bases on which, a third party's participation in another's breach of fiduciary duty or breach of trust, could render that person accountable in equity as a "constructive trustee" (to use the commonly adopted but often unhelpful formula): *Farah Constructions*, at [161].
>
> The fact findings made in this case reveal, potentially, four quite different manifestations of such participation. Each type warrants present note. The first, is where the third party is the corporate creature,

vehicle, or alter ego of wrongdoing fiduciaries who use it to secure the profits of, or to inflict the losses by, their breach of fiduciary duty: see eg *Cook v Deeks* [1916] AC 554 ("Cook") at 565; *Queensland Mines Ltd v Hudson* (1975–1976) ACLC 28 at 658 at 27,709, revsd on other grounds (1978) 18 ALR 1; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 (Timber Engineering) at (11); *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32 (Green v Bestobell); *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at [26]; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 ("CMS Dolphin") at [97]–[105]. In these cases the corporate vehicle is fully liable for the profits made from, and the losses inflicted by, the fiduciary's wrong. The liability itself is explained commonly on the basis that "company had full knowledge of all of the facts": Cook, at 565; it is the alter ego of the fiduciary with a "transmitted fiduciary obligation": *Timber Engineering*, at (11); or that it "jointly participated" in the breach: *CMS Dolphin* at [103]. Liability does not turn on the need to show "dishonesty", although it often provides the reason for the interposition of the company. Proof of a breach of fiduciary duty will suffice; *Green v Bestobell*, at 40. And, as was said in *CMS Dolphin* (at [104]), it is "rather artificial" to use *Barnes v Addy* to explain this liability.

163 Mr Bedrossian also referred to the review of the authorities by Beech J in *EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3)* [2013] WASC 183 at [406]ff. The observations in *Grimaldi v Chameleon Mining NL (No 2)* above were also applied by the Court of Appeal in *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* above at [178] and by Ball J in *Twigg v Twigg (No 4); Lambert v Twigg Investments Pty Ltd (No 3)* above at [138].

164 It was not necessary for MDL to plead any facts, beyond those already pleaded, to advance that claim, and the Robert Murdoch Interests have had procedural fairness in respect of that claim, where the relationship between Robert, Stephen, RKM and BPPL has been addressed at length by all parties. Mr Kelly fairly accepted in closing oral submissions that he could not point to any prejudice arising, at an evidentiary level, from the Brian Murdoch Interests' reliance on the alter ego principle to support their claims against RKM and BPPL. It seems to me have been established that RKM was Robert's alter ago or vehicle and BPPL was Stephen's alter ego or vehicle. Mr Bedrossian pointed out that Robert was both the director and major shareholder of RKM at the relevant time, as is accepted by the Robert Murdoch Interests in their Defence; Stephen did not become a shareholder in RKM until about 29 June

2012 and, I interpolate, I have found that Stephen was knowingly involved in the relevant breaches in any event; and there is no suggestion that Robert's wife, who had a minority shareholding in RKM since 2003, took any active role in it, so as to dilute Robert's control over RKM or prevent a finding that RKM is his alter ego.

*Remedies sought by MDL in respect of the work done at the Cadia mine*

165 It will be convenient first to identify MDL's pleaded claims for remedies in respect of the work done at the Cadia mine, then to note the parties' submissions and applicable principles and then the expert evidence as to quantification. MDL pleads (FASC [16]) that, by reason of MDL not having performed the work available pursuant to the Cadia Contract, it missed out on the opportunity to earn income and suffered damage and (FASC [17]) that, to the extent that there were amounts paid by MDL to RKM and/or BPPL purportedly on account of either or both of those companies performing work for the purposes of the Cadia Contract, those payments were excessive and also constituted a breach by Robert of his statutory and fiduciary duties to MDL and constituted a breach by Stephen of his statutory and fiduciary duties to MDL.

166 MDL claims (FASC [18(a)]) that Robert is liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL. In respect of the later work at Cadia, MDL pleads (FASC [25]) that, by reason of MDL not pursuing the further work in relation to the Cadia mine and, consequently, by not having the opportunity to perform further work at the Cadia mine, MDL missed out on the opportunity to earn profits and to develop further work opportunities and has thereby suffered damage and (FASC [26(a)]) that, by reason of these matters, Robert is liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL.

167 MDL also claims (FASC [18(b)-(c)]) that RKM and BPPL are liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL and are also liable to account to MDL for all profits derived by them as a result of work undertaken directly or indirectly in relation

to the Cadia Contract (as defined). In respect of the later work at Cadia, MDL also pleads (FASC [26(d)-(e)]) that BPPL is liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL and is also liable to account to MDL for all profits derived by it as a result of work undertaken directly or indirectly in relation to the Cadia Contract and also holds any contract or tender approval, which has been obtained by it in relation to the Cadia mine site, upon trust for MDL.

168 MDL claims (FASC [18(d)] that Stephen is liable to pay compensation pursuant to section 1317H of the *Corporations Act* and equitable compensation to MDL. In respect of the later work at Cadia, MDL also pleads (FASC [26(f)]) that Stephen is liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL.

169 It seems to me that MDL has not established the amount of the loss and damage it has suffered, since it has not established the costs of acquiring or hiring the equipment necessary for it to perform the work other than from RKM or BPPL or that the amounts paid to them were more than a market rate. It is not necessary for it to do so in order to claim an account of profits at general law or statutory compensation under s 1317H of the *Corporations Act*. The amount of any equitable compensation claimed by MDL against Robert, RKM, BPPL and Stephen respectively (FASC [18(a)-(c)], [26(d)-(e)]) has therefore not been established.

170 Turning now to the claim for an account of profits, in *Warman International Ltd v Dwyer* above, in dealing with claims for breach of fiduciary duty arising from the appropriation of part of a company's business, the High Court held that Warman was entitled to elect between an account of profits for a specified period and equitable compensation for loss. The Court there noted (at 560) that the scope of an account of profits depends on factors including the nature of the property, the relevant powers and obligations of the fiduciary and the relationship between the profit made and those powers and obligations; that (at 560-561) an account of profits of a business may be appropriate where they are acquired by the fiduciary within the scope of his or her fiduciary responsibilities, but it may be inappropriate to require a fiduciary to account for

the whole of the profit over an indefinite period; the defendant bears the onus of establishing any claim that it is inequitable that it should be required to account for the entire profits; and (at 565) the extent of an account of profits will depend on what was acquired in consequence of the fiduciary's breach of duty and the extent of the plaintiff's loss may also be relevant. Importantly, an account of profits is available even if the principal has not suffered loss by reason of the breach of duty, because it would not have been in a position to take account of the opportunity*: Regal (Hastings) Ltd v Gulliver* above; *Industrial Development Consultants Pty Ltd v Coole*y [1972] 1 WLR 443.

171 Mr Bedrossian refers to the observations of Beech J in *EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3)* above at [434], that the plaintiff seeking an account of profits:

> "must show that the profit was derived by reason of the fiduciary's position or his taking advantage of opportunity or knowledge derived from it;
>
> liability to account does not depend upon the plaintiff having suffered any loss;
>
> and it is generally irrelevant that the principal could not have earned the profit claimed from the fiduciary."

172 In *Gunasegaram v Blue Visions Management Pty Ltd* [2018] NSWCA 179 at [267], the Court noted that the circumstances in which an account of profits may be available have been variously formulated as where the relevant profits were "attributable to the breach" or "obtained by the infringement" or where the benefit flowed in breach of the duty or by reason of the breach. In *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1; (2018) 130 ACSR 359; [2018] HCA 43, the majority of the High Court held that a third party was liable for the full value of a business that it acquired in circumstances that amounted to knowing participation in two senior employees' dishonest breach of fiduciary duty and not only for the profits derived from it over a limited period.

173 In *Schmidt v AHRKalimpa Pty Ltd* [2020] VSCA 193 at [185], [188]-[189], the Court of Appeal of the Supreme Court of Victoria in turn summarised the principles applicable in assessing compensation and allowing an account of profits as follows:

"In accordance with the 'cardinal principle' of equity, 'the remedy must be fashioned to fit the nature of the case and the particular facts'. As to the method of assessing equitable compensation, it has been said that this will vary according to the nature of the fiduciary obligation whose breach is to be redressed. Equitable compensation is often calculated by reference to the loss suffered by the innocent party. However, in some cases, it may be appropriate to compensate the claimant by reference to the profits earned or gain made by the person who committed the breach of fiduciary duty. …

In the context of an account of profits, it has been said that in determining the remedy for a breach of fiduciary duty, the claimant should not obtain a windfall or be unjustly enriched. Further, a breaching fiduciary may be able to establish that some profit or benefit is beyond the scope of liability for which he or she should account, such as where the profit or benefit has no reasonable connection to the wrongdoing. However, once a causal link to the profit or benefit claimed is established, the onus is on the errant fiduciary to show that he or she should not account for the full value of the profit or benefit. Accordingly, profits may be apportioned if an antecedent arrangement exists for the sharing of those profits. In the absence of an antecedent arrangement for the sharing of profits, a defaulting fiduciary may be entitled to an allowance for skill, expertise and expenses. As was said by the High Court in *Warman International Ltd v Dwyer* :

> [A] distinction should be drawn between cases in which a specific asset is acquired and cases in which a business is acquired and operated. …
>
> In the case of a business it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources. This is not to say that the liability of a fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

The flexibility of the remedies for a breach of fiduciary duty committed in relation to the establishment of an ongoing business is exemplified by the following statement by Gageler J in *Ancient Order* which was made in the context of a claim for an account of profits:

> Where the benefit or gain which has in fact been obtained by the errant fiduciary … is the establishment of an ongoing business, the outcome might accordingly be that the fiduciary … is liable to account 'for the entire business and its profits, due allowance being made for the time, energy, skill and financial contribution that [the fiduciary …] has expended or made'. Depending on the circumstances, the outcome in the alternative might be that some lesser measure, more favourable to the fiduciary … is judged better to reflect the equities of the case." [citations omitted]

174 In *CellOS Software Ltd v Huber* (2020) 144 ACSR 267; [2020] FCA 505, Beach J summarised the principles applicable to an account of profits at [9]-[19] as follows:

> "A secure starting point is Mason J's observations in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 107 to 110.
>
> First, a fiduciary is liable to account for a profit or benefit obtained:
>
> (a) in circumstances where there is a conflict or possible conflict of interest or duty; or
>
> (b) by reason of the fiduciary taking advantage of any opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position.
>
> In *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1 at [68] and [69] , Gageler J elaborated on these two bases, and then went on to observe three matters that are relevant to my context, namely:
>
> (a) it is not necessary for the fiduciary to be liable to account that the benefit or gain to the fiduciary be at the expense of the principal;
>
> (b) it is not necessary to show that the fiduciary acted dishonestly, fraudulently or otherwise than in good faith;
>
> (c) but contrastingly to (b), if a knowing participant in someone else's breach of fiduciary duty is to be held liable to account, the conduct of the fiduciary must be shown to be of a dishonest and fraudulent character.
>
> Second, as Mason J said, to be liable to account it is not necessary to show and it makes no difference that it was not the fiduciary's duty to obtain the profit or benefit for the person to whom the duty was owed as an incident of his fiduciary duty.

> Mason J then took forward some of these themes as a participant in the joint reasons in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557 to 562. Let me continue adding to the list of propositions that can be synthesised from *Warman* as further expounded in *Ancient Order*.
>
> Third, liability to account does not depend upon establishing that the person to whom the duty was owed had suffered injury or loss. But when accounting for profits, "the amount of what has been lost by the plaintiff may in some situations be relevant to what has been gained by the errant fiduciary or knowing assistant" (*Ancient Order* at [190] per Nettle J). There is of course no contradiction here. Liability to account is not so contingent. But if there is injury or loss to the person to whom the duty is owed, then such injury or loss is not necessarily irrelevant in a forensic sense in the account context.
>
> Fourth, in practice the assessment of the profit may be difficult. Now given the nature of the task, no arithmetical exactness is required. But what is required is to be as accurate as one can, albeit that this may in context not rise higher than reasonable approximation because of forensic limitations or imprecision inherent in the evaluative exercise of determining the causally connected profit or gain. I will elaborate on this causation question in a moment.
>
> Fifth, "[it] is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts" (Warman at 559).
>
> Sixth, in terms of determining the liability to account for and disgorge any profits, one is not confined to looking only at the direct result of particular acts of wrongful knowing assistance. One is entitled to look at the overall effect of the wrongful conduct (*Ancient Order* at [4] and [5] per Kiefel CJ, Keane and Edelman JJ).
>
> Seventh, what an errant fiduciary or knowing participant is required in equity to account for in terms of any gain or benefit is surely to be informed by the nature of the equitable duty or obligation found to have been breached, as well as the state of mind of the fiduciary or both the fiduciary and the knowing participant.
>
> Eighth, it is for the respondent "to establish that it is inequitable to order an account of the entire profits" (*Warman* at 561). So, if there has been a mingling of the profits attributable to the respondent's breach of fiduciary duty with the profits attributable to the respondent's efforts and investment not connected to the opportunity gained by being a fiduciary, the respondent bears the onus of justifying the disentanglement."

175 His Honour also observed (at [23]-[34]) in respect of the issue of causation in a claim for account of profits that:

> "Second, it may be sufficient to establish a causal connection if the benefit or gain to the fiduciary or knowing participant would not have been obtained "but for" the breach ([*Ancient Order* per] plurality at [9] and Gageler J at [88]), but that is not the only way to establish

causation; for example, a test of material contribution may suffice and even where a "but for" test is not satisfied.

Now as I have indicated, where a causal connection is shown to exist, the onus shifts to the respondent to establish that it is inequitable to require an accounting of the total value of the benefit or gain received. So, the plurality said (at [13]):

> While it is true that equity will not require an errant fiduciary or a participant in a breach of fiduciary duty to account for an advantage which the breach of fiduciary duty has not caused or to which it has not sufficiently contributed, where causation is sufficiently established the onus is upon the errant fiduciary or participant to show that he or she should not account for the full value of the advantage. That onus is not discharged by mere conjecture or supposition giving the benefit of the doubt to a proven wrongdoer. The requirement of proof conforms with the obligation of a party charged with a breach of fiduciary duty to show why the full value of an advantage obtained in a situation of conflict of duty should not be disgorged.

(Citations omitted.)"

176 Several matters establish the link between the breaches of fiduciary duty which I have found and RKM and BPPL making the relevant profits in respect of the Cadia mine. Obviously, Robert's and Stephen's actions in respect of the subcontracting or equipment hire transactions between MDL on the one hand and RKM and BPPL on the other were casually linked with the revenue and profits derived by RKM and BPPL from those transactions. So far as RKM and BPPL subsequently provided services to CVO or Cadia Holdings, to the exclusion of MBL, Mr Bedrossian points out, and I accept that Robert and Stephen were able to obtain access to the Cadia mine site because of their induction on that site in respect of MDL; Stephen was able to leave RKM's equipment on the Cadia site, so as to make it available to CVO for hire, because MDL had access to that site as a contractor; and that the evidence to which I have referred establishes that work opportunities at the Cadia mine flowed through to RKM and BPPL through the relationship that MDL had developed with CVO over previous years.

177 Mr Kelly submits that MDL is not entitled to relief by way of an account of profits, so far as its claim in respect of the Cadia Mine turns on "subcontracting" to RKM or BPPL. I recognise that, although MDL pleads an alternative allegation of subcontracting, there appears to have been no documented

subcontract between MDL and RKM or BPPL, and the equipment rental agreement (Ex J1, B1045) between MDL and BPPL appears to have had limited operative effect where BPPL did not own the equipment so as to hire it to MDL under that agreement. I will return to the significance of those matters below.

178 Mr Kelly also submits that, in that situation, the only relief to which MDL is entitled in respect of equipment hire from RKM or BPPL is damages. Mr Kelly there relies on the observations of Latham CJ in *Peninsular and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at 212-213; [1938] HCA 16, a case which related to a claim for an account of profits in respect of a contract for the purchase and resale of machinery. His Honour referred to the position where an agent sells his own property to his principal without disclosing his interest and observed that:

> "In such a case there may be rescission and an account of profits, but where rescission is impossible no account of profits is given because (it is said) the result would be really to make a new contract between the parties (*Re Cape Breton Co* [(1884) 26 Ch D 221; (1885) 29 Ch D 795]; *Burland v Earle* [(1902) AC 83]). Therefore the only remedy available is a remedy in damages for breach of duty by Johnson as general manager and by Johnson & Lynn Ltd as managers under the managers' agreement. But in order to support such a claim it is necessary to show that the colliery company actually suffered damage. If the company got value for its money, then no damage has been suffered."

179 Mr Kelly also relies on *Daly v The Sydney Stock Exchange Ltd* (1985) 160 CLR 371 at 389, which addressed the question whether a borrower would here be made a constructive trustee while the underlying loan contract remains in place. Mr Kelly also referred to *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198 at [173]-[206], which deals with the position where a loan contract existed and continued in effect unless and until it was avoided, and emphasises that a contract of loan made in consequence of a breach of fiduciary duty by a director was voidable and not void. It is not apparent that principle would extend to the position where the parties have not made a contract, although services or equipment have been supplied and paid for as a result of breach of fiduciary duty. There is no obvious necessity to set aside or vary a contract which does not exist, or does not have legal or

operative effect in respect of the large majority of transactions, in order to obtain an account of profits in that situation.

180 These principles apply at least where there is a sale of property to a principal without disclosure of the fiduciary's interest and, in that situation, there can be rescission and an account of profits, but no account of profits is available where rescission is impossible and the result would be to make a new contract between the parties. I asked Mr Kelly, in closing submissions, to identify the contractual arrangements on which the Robert Murdoch Interests relied to support the application of this principle in this case. Mr Kelly pointed to Ms Sullivan's evidence as to invoicing arrangements (Sullivan [86]-[95]; [126]-[129]), but those invoices did not involve any contract between MDL and RKM or BPPL, but invoices issued by MDL to CVO. He also referred to Mr Mullins' assessment of the income earned by RKM and BPPL from the relevant work, but a contract is not required to derive income. It did not seem to me that Mr Kelly adequately articulated how any contract between MDL and RKM came into existence, or any contract between MDL and BPPL prior to the equipment hire agreement which I address below. There was no particular reason for RKM or BPPL to require a contract with MDL, since Robert's management control of MDL meant that there was no significant risk that RKM or BPPL would not be paid for the work they undertook for or equipment they supplied to MDL, at whatever rate Robert determined.

181 Mr Bedrossian in turn referred to *Aequitas Ltd v Sparad (No 100) Ltd (formerly Australian European Finance Corp Ltd)* (2001) 19 ACLC 1006; [2001] NSWSC 14, where Austin J referred to authority that an account of profits is not available where a property was acquired by a promoter before he or she became a promoter, unless rescission is possible, but noted that the reasoning underlying earlier authorities was unsatisfactory, especially where rescission had become impossible, and that refusal of an account in such a case would work serious injustice. His Honour noted that, in such a case, an order for an account of profits is not directed to rewriting the contract, but to addressing the consequences of conduct that was collateral to it. His Honour also observed (at [429]) that that reasoning is inconsistent with a modern approach to remedies, where the appropriate remedy is determined by the nature of the case. Mr

Bedrossian also draws attention to *Grimaldi v Chameleon Mining NL* above at [278]-[281], where the Full Court of the Federal Court referred to *Daly v The Sydney Stock Exchange Ltd* above and to *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153-154, and observed (at [281]) that the evolution of equity may lead to a review of the rescission requirement in respect of the imposition of a constructive trust. Mr Bedrossian submits that an account of profits would not, in this case, involve any element of double compensation to MDL, which would still pay the cost incurred by RKM or BPPL in providing the relevant equipment, but would recover the profit obtained by those parties, placing it in the same position as if it had itself incurred the cost of providing those services, but secured the profit for itself.

182 It does not seem to me that the principle on which Mr Kelly relied is applicable here. As I noted above, there is no evidence that RKM provided the relevant equipment to MDL under a contract, or that the equipment rental agreement between MDL and BPPL (Ex J1, B1045) had operative effect, where the term of that agreement was left blank and BPPL did not own equipment of any substance to lease to MDL under it, and it appears that equipment was made available to MDL on the basis that the hire charges were invoiced at rates determined by Robert rather than established by any contractual arrangement between the parties. The order for an account of profits does not remake any contract between the parties, because there was no operative contract in that respect. I would, if necessary, distinguish the cases on which Mr Kelly relied, where it is here possible to order an account of profits without any inconsistency with any operative contractual arrangement or any risk of double compensation or unjust enrichment to MDL from that account.

183 Mr Kelly also submits that, apart from the claim made for an account of profits derived by RKM and BPPL as a result of work undertaken directly or indirectly in relation to the Cadia Contracts (as defined in FASC), there is no other claim for an account of profits in connection with Cadia. I do not accept that submission, which turns on an overly literal reading of the FASC, and is inconsistent with the evidence led at the hearing and the basis on which the parties have conducted the case.

184 The Robert Murdoch Interests also submit that evidence that Brian was "standing by" warrants the limiting of any account of profits, and that the conduct of a plaintiff may be such as to make it "inequitable to order an account": *Warman International Ltd v Dwyer* above at 561. Mr Kelly submits that no account of profits in respect of work done for Cadia should run after the dates on which Brian is said to have had information that Stephen had his "gear" at Cadia, or that (as I noted above) Scott had asked Stephen if Scott's crusher could be put at work at Cadia. Mr Kelly also refers to the evidence, which I have noted above, that Scott had raised concerns with Brian as to the conduct of Robert and Stephen and contends that Brian "remained silent" while he knew that Stephen continued to do work at Cadia. I have addressed these issues in dealing with the evidence and questions of disclosure, consent and estoppel above.

185 I do not accept that this submission warrants any limiting of an account of profits. First, it again fails to recognise that Brian did not have full information as to the arrangements under which work was being undertaken at Cadia, and Mr Kelly himself repeats the proposition that Stephen (as distinct from RKM or BPPL) undertook the work at Cadia; and, second, it gives insufficient weight to the fact that Brian was understandably reluctant to confront Robert over these matters, as Scott's evidence made clear. That reluctance was hardly unreasonable. There is nothing inequitable in allowing an account of profits, against a fiduciary in breach of duty, in these circumstances.

186 For these reasons, an account of profits should be ordered against RKM and BPPL, subject to MDL's election as to remedy. Such an account was not sought against Robert and Stephen.

187 As I noted above, MDL also claims compensation under s 1317H of the *Corporations Act*. That section allows the Court to order a person to compensate a corporation for damage suffered by it, if that person has contravened a civil penalty provision in relation to the corporation and the damage resulted from the contravention. The words "resulted from" in this section refer to damage which, as a matter of fact, was caused by the contravention and require a causal connection between the damage and the

contravening conduct. The Court may include profits made by any person resulting from a contravention or offence, in determining the damage suffered by a corporation for the purposes of making a compensation order under this section: s 1317H(2); *Grimaldi v Chameleon Mining NL (No 2)* above at [630]–[631]. In *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* above at [54], the Full Court of the Federal Court noted that the effect of that subsection was to extend the compensatory scheme of the section by authorising the Court to order that compensation include profits, even if there was no corresponding loss on the corporation's part; and noted the section conflated the concepts of equitable compensation or damages on the one hand and account of profits on the other.

188 It seems to me that the profits earned by RKM and BPPL are also recoverable, within the extended meaning allowed to the term “damage” in s 1317H of the *Corporations Act*, following the approach adopted by the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL (No 2)* above at [630]-[631]. Mr Kelly submits, and I accept, that recovery is only possible for damage which, as a matter of fact, was caused by the contravention. However, the profits earned by RKM and BPPL, and the consequential “loss” (in the statutory sense) to MDL were caused by the relevant breach, namely the entry into the equipment hire arrangements between MDL and RKM and BPPL for work done at the Cadia mine, and subsequently the direct dealings between RKM and BPPL, in circumstances of breach at least of ss 181 and 182 of the *Corporations Act* by Robert and Stephen. I find that Robert is liable to pay compensation under s 1317H of the *Act*, which can extend to the profits made by RKM, where RKM is Robert’s alter ego. Stephen is also liable to pay compensation under s 1317H of the *Act*, which can extend to the profits made by BPPL, where BPPL is Stephen’s alter ego. BPPL and RKM are also liable to pay compensation under s 1317H of the *Act*, which extend to the profits made by both of them where the Robert Murdoch Interests accepted (as I note below) that it was not necessary to distinguish their respective positions.

189 Turning now to the quantum of this claim, neither party’s expert evidence distinguished in respect of quantification between the revenue and profits earned by RKM and BPPL from the Cadia work. Mr Bedrossian contended that

the Court should also take that approach. Mr Kelly initially submitted, in closing submissions in answer to a question from me, that the Robert Murdoch Interests did not accept that RKM and BPPL could be treated together for the purposes of any liability owed to the Brian Murdoch Interests. That proposition would plainly have caught the Brian Murdoch Interests by surprise, where the expert accounting evidence led by the Robert Murdoch Interests had not distinguished the positions of RKM and BPPL, and the suggestion that that approach was not a proper one had not been raised by the Robert Murdoch Interests at any point in the conduct of the proceedings. After the completion of the hearing, Mr Kelly subsequently advised the Court, on 17 September 2020, that the Robert Murdoch Interests now accept that there is no need to distinguish between RKM and BPPL in relation to the quantification of any loss or any account of profits, consistent with the approach adopted by both parties' accounting evidence in treating those entities together.

190 Mr Bedrossian points out that RKM and BPPL received revenue of $9,169,378 for work performed for Cadia in the financial years ending 30 June 2010 to 30 June 2014, by reference to the accounting expert evidence on which the parties rely. The expert report of Mr Mullins on which the Robert Murdoch Interests relied quantified the profit from the Cadia work in that period as $4,135,376 after making allowance for a "capital charge" and an "economic risk" allowance. I do not accept that allowance, which is not supported by any disclosed accounting standards or any other established accounting principle. Mr Mullins accepts that, if the approach of making an allowance by way of capital charge or economic cost is not appropriate, then the correct figure for the net profit made by the Brian Murdoch Interests in respect of work undertaken at the Cadia Mine is $4,358,106, calculated in accordance with generally accepted accounting principles, and he reaches the same result as the expert report of Mr Ashby on which the Brian Murdoch Interests relied in that respect (Ex D12 [3.2]-[3.5].

191 It will be necessary for MDL to elect whether to pursue a claim for compensation or an account of profits in respect of these claims. That election will need to be made by the liquidator who will be appointed to MDL by the order which I make below, since the leave granted to Brian to bring a derivative

action under s 237 of the *Act* will not have continued effect in respect of a company in liquidation, and there is no obvious reason that further leave would be granted to Brian to pursue the derivative claim in equity where a liquidator is well placed to enforce MDL's rights.

192 I note, for completeness, that Mr Bedrossian also addressed, in closing submissions, the question of how interest on after tax profits made by RKM and BPPL would be calculated, in determining equitable compensation or an account of profits. The Robert Murdoch Interests respond that a claim for compound interest should not be accepted and Mr Kelly addressed, in closing written submissions, the circumstances in which an order for compound interest may be made ([298]ff). It is not necessary to address that question until a liquidator of MDL has made an election between compensation and an account of profits, and it may be that the Robert Murdoch Interests and a liquidator of MDL will be able to agree that matter between themselves.

*MDL's claim as to the acquisition of the Timboon quarry*

193 Turning now to MDL's claim in respect of the Timboon quarry, it will be convenient first to refer first to MDL's pleaded case, then to the affidavit and documentary evidence, then the scope of the applicable legal principles, before reaching conclusions as to liability and, to the extent necessary, dealing with the question of quantum.

194 MDL pleads, and it is common ground (FASC [35]-[36], Defence [35]-36]]) that, in or about 2010, Kurdeez Lime and/or VAL owned a property located at Timboon, Victoria on which a quarry, which was in part a limestone quarry, was located and owned machinery and equipment used for quarrying activities on the quarry land, in October or November 2010, sought to sell the quarry land, licence and equipment. MDL pleads and the Robert Murdoch Interests deny (FASC [37], Defence [37]) that MDL had or would have had a "legitimate interest" in the quarry land and associated assets at that time and the acquisition of them would have been beneficial to MDL. The reference to a "legitimate interest" here appears to be intended to invoke corporate opportunity principles. MDL also pleads (FASC [38]-[39]) that, no later than about November 2010, Robert and Stephen knew about the availability or likely

availability of the quarry land and associated assets for purchase and did not informed Brian, or otherwise separately inform MDL, of their availability. I refer to the evidence as to that matter below.

195 It is common ground (FASC [40], Defence [40]) that, on or shortly prior to 17 February 2011, Robert and/or Stephen took steps to cause Kurdeez Minerals to be incorporated, with Stephen as the sole director and as the owner of 90% of its shares. MDL pleads and the Robert Murdoch Interests deny (FASC [41], as amended in the course of the hearing; Defence [41]) that that was done for the specific purpose of performing the role as the corporate vehicle for the operation of the quarry land, licence and/or equipment, but little turns on that question. MDL also pleads (FASC [42]) that, in or about February or March 2011, Robert and/or Stephen caused and/or permitted an offer to be made and contracts to be exchanged, other than in the name of MDL, for the purchase and/or transfer or assignment of the quarry land and associated assets and, subsequently, caused RKM or Kurdeez Minerals to acquire or take legal title to that land and associated assets. The Robert Murdoch Interests plead specific steps taken in respect of the acquisition and otherwise deny the paragraph.

196 There is no real issue as to the acquisition of the Timboon quarry by interests associated with Robert and Stephen and Stephen's evidence addresses his involvement in the acquisition of the Timboon quarry (Stephen 20.11.17 [464]ff). A contract for sale of the Kurdeez Lime business was signed by Robert on behalf of RKM on 17 February 2011 (Ex J1, B1205, C/D 1972ff) and RKM there purchased the Kurdeez Lime business, including the buildings, plant and equipment in February 2011 for $825,000, exclusive of GST and adjustments. About the same time, Stephen appears to have formed a favourable assessment of the quality of the limestone resource at the Timboon quarry (Ex J1, B1214). RKM also then took an assignment of the lease (Ex J1, C/D 2088ff) and subsequently purchased the land on which that business was situated from VAL for the further amount of $275,000. RKM funded the acquisition of the Timboon quarry by a substantial bank facility (Ex J1, B1280). It appears that RKM has since acquired additional land to provide accommodation for the site manager and a buffer for quarry operation. RKM

now holds the physical assets, including the land, and Kurdeez Minerals produces and sells limestone and lime products from the Timboon quarry.

197 MDL pleads and the Robert Murdoch Interests deny (FASC [43], Defence [43])) that, in taking the pleaded steps, and in failing to give MDL the opportunity to take, or failing to cause MDL to take, the pleaded steps, Robert breached his fiduciary duties to MDL and his duties to MDL pursuant to sections 180-183 of the *Corporations Act*; and Stephen breached his fiduciary duties to MDL and his duties to MDL pursuant to sections 180-183 of the *Corporations Act* and his contractual duties to MDL. This is the critical step in this claim and also involves what is sometimes described as a corporate opportunity claim.

*The evidence as to acquisition of the Timboon quarry*

198 Turning now to the affidavit evidence and cross-examination, Robert addresses the circumstances of the acquisition of the Timboon quarry in his first affidavit (Robert 20.11.17 [468]ff). Robert's evidence is that he had a conversation with Brian in which he said that Stephen had found a quarry in Victoria and that he was going to have a look at it for him in January 2011 (Robert 20.11.17 [475]). He also refers to a subsequent conversation where he claims to have told Brian that he and Stephen were on their way back from looking at the quarry which was a "bit of a mess" but had "potential" (Robert 20.11.17 [484]). I think it likely that these conversations occurred.

199 Robert accepted in cross-examination that his responsibilities for the identification of profitable opportunities for MDL "and the Murdoch Group" extended to businesses and quarries operated outside of Mudgee (T258). However, that is not sufficient to support Brian's claim in respect of Timboon, which requires the opportunity to acquire that quarry be an opportunity of MDL, which has brought the claim, not that it be an opportunity that it could have been taken up elsewhere in the Murdoch Group. Robert rejected the proposition in cross-examination that, but for the proposed split of the companies, MDL would have been involved in the acquisition of the Timboon quarry, on the basis that there were quarry acquisitions closer to Mudgee that would be more profitable and of less risk than the acquisition of the Timboon quarry (T378). That evidence was not wholly consistent with the fact that

Robert and Stephen, through their respective companies, pursued the acquisition of the Timboon quarry rather than the closer quarries, unless it impliedly recognised that the Timboon quarry allowed the opportunity for a greater profit at a greater risk.

200 Stephen also refers to a conversation with Brian in early 2011 in which he disclosed that he and Robert were looking at a quarry down in Victoria and, in answer to a question by Brian, identified the quarry was owned by Kurdeez Lime which had gone into liquidation. He also refers to subsequent conversations with Brian about how the limestone quarry in Victoria was going (Stephen [501]-[502]). I accept Stephen's evidence that these conversations took place.

201 Scott became aware that Robert and Stephen had purchased Kurdeez Lime from a third party in late February 2011 and he promptly advised Brian of that matter (Ex J1, B1241, T136). However, Brian's evidence was that he did not know about the purchase of the Timboon quarry, through Kurdeez Lime, by Robert or Stephen or their companies and only found out about that purchase "some years" after it took place and that the fact that the site was in Victoria would not have caused him to reject the purchase for MDL (Brian 6.7.17 [130]-[131]). Brian's evidence in his second affidavit dated 28 March 2018 is that he was not aware that Robert was in Timboon in 2011; he acknowledges that he does not believe that a quarry in Victoria would have competed against MDL, but he claims to have believed that the Timboon lime quarry was something that MDL was pursuing and that it was not being pursued by Robert or Stephen outside MDL (Brian 28.3.18 [33]). He does not identify any basis for his holding that belief. It appears that Brian's recollection here is faulty, where Scott's evidence means that he must have known of the purchase of the quarry by February 2011, and Robert's and Stephen's evidence, which I am inclined to accept (as I noted above) indicates that he would have known of a possible purchase before that time.

202 Brian was cross-examined at some length in respect of the Timboon quarry. Brian's evidence in cross-examination was at one point that he did not know about the Timboon acquisition until after Robert or Scott acquired the quarry

(T117). Brian was cross-examined as to a suggested telephone conversation with Robert in January 2011, in which Robert had told him that Stephen had "found a quarry in Victoria"; his evidence was that he did not remember that conversation. He gave evidence as to the poor condition of a quarry (T187), which may have been directed to the Timboon quarry, and observed that "it was too far away from us to operate it from Mudgee and … it was in a bad rainfall area, which would have made it very difficult to operate" (T188). He accepted that, in January 2011, it was his understanding that that quarry was a "complete mess" (T188-189), and it appeared that he had been to the quarry previously and that it was "at the end of its life" (T189). Brian also accepted that he would have had a conversation with Robert in January or February 2011 about that quarry and that:

> "There was a lot of work to be done on it. And I didn't think at the time that we needed to expand into something that was going to eat up all our reserves." (T190)

203 There is a basis for thinking that Brian was there referring to the Timboon quarry, because he referred to the fact that Robert then bought a house down there, which is a reference to the fact that Robert had acquired a property near the Timboon quarry. He then responded to a further question put by Mr Kelly as follows:

> Q. This Kurdeez [Timboon] Quarry is a quarry that you would never have dreamed of taking on yourself?
>
> A. No. No you wouldn't, you would go and start a new one. Cut out all the mistakes."

204 Brian's evidence was also that he had spoken to Scott about Stephen's interest in Timboon and told him that:

> "I reckon there was too much money to be spent there, so make it worthwhile. Because at the same time we were looking at a – another quarry in New Zealand." (T190)

Brian again returned to his lack of interest in that quarry in observing that he lent money to Scott to help him acquire the Braeside quarry at Scone, but "wouldn't have lent money on Timboon" (T191).

205 In closing submissions, Mr Bedrossian submits that there is reason to doubt the accuracy of Brian's oral evidence that he had seen the Timboon quarry in

person, and Mr Bedrossian raises the possibility, which has troubled me, that Brian was confused in giving that evidence, and was possibly referring to the visit to New Zealand to inspect another quarry (to which I refer below) rather than a visit to the Timboon quarry. Mr Bedrossian also pointed out that Robert did not give any evidence supporting a suggestion that Brian had visited the Timboon quarry, either with Robert or with Stephen or independently. I have given careful consideration to whether, given his health issues, Brian understood that his part of his cross-examination was directed to the Timboon quarry, and I am left uncertain as to that matter. I bear in mind that the Brian Murdoch Interests led his affidavit evidence and did not suggest he lacked the capacity to give evidence as to relevant matters. I also recognise that Mr Kelly made clear in the cross-examination that he was referring to a quarry in Victoria (T186-187) and "down south" (T190-191), which can only be the Timboon quarry. Although Mr Kelly referred to Robert having called Brian from Apollo Bay in Victoria, I am left in doubt as to whether Brian's answer that "[i]t was not a very big place" (T188) referred to Timboon or the areas he and Robert had visited in New Zealand. Brian's evidence that he knew the quarry from when "we went in", apparently with Robert at some point (T189) could only be correct in respect of the New Zealand quarry or if he and Robert had in fact visited Timboon. It was not clear whether Brian was referring to Timboon or a quarry he had visited with Robert in New Zealand when he contrasted the state of that quarry unfavourably with the quarries that Scott was investigating in New South Wales and with "another quarry" that he and Robert had looked at in New Zealand (T190), and it was plain that, at a later point, Brian was confused in thinking that the Timboon quarry was in New Zealand (T225) and that, once it was pointed out to him that Timboon was in Victoria, he then observed that he had never been to Timboon (T226). I do not think I can rely on this cross-examination, although Mr Bedrossian did not seek to re-examine Brian to raise any suggestion that he was not referring to Timboon quarry in this evidence.

206 As I noted above, the Brian Murdoch Interests also rely on the affidavit dated 6 July 2017 of Mr Bouverie, who was the sole director of Kurdeez Lime before that company and VAL were placed in voluntary administration. Mr Bouverie

refers to a meeting with Robert and Stephen, who were accompanied by Mr McDonald of the Murdoch Group, in about November 2010, and to Robert's returning to the land on at least two further occasions. He refers (without recognising the corporate entities involved) to Robert's and Stephen's entering an agreement to purchase the Timboon quarry in February 2011, and also refers to a request by Robert to change the website for the quarry to indicate that "we can also supply dolomite from Mudgee" and to provide the contact number for the Mudgee business. He refers to a change made to the website which indicated that the Kurdeez operations had been taken over by the "Mudgee Dolomite and Lime Group" and referred to the experience of that Group, and to change the contact number for the business to MDL's number. In his first affidavit, Robert responds to Mr Bouverie's affidavit sworn 6 July 2017, by referring, in effect, to the need to identify an association of Kurdeez Lime with the Murdoch Group, following its purchase by Robert and Stephen, in order to promote confidence in the business.

*The parties' submissions and the applicable legal principles*

207 In opening submissions, Mr Bedrossian characterises this claim as relating to the diversion of the opportunity to acquire and then operate a limestone quarry (including land, mining licence and equipment) in Timboon, Victoria away from MDL and to RKM and Kurdeez Minerals. That characterisation accurately records an essential premise of the claim, that the opportunity to acquire and operate that limestone quarry was within the scope of MDL's business. Mr Bedrossian submits that:

> "A new lime quarry, even if in Victoria, was an asset or an opportunity that was both in MDL's interest to acquire but also well 'within the ball park' of MDL's existing business activities and squarely within MDL's existing and anticipated line of business."

208 Mr Bedrossian submits that the fact that the Timboon quarry is located in Victoria is not an answer to the allegation of breach of duty in its acquisition by Kurdeez Minerals. I accept that that matter is not an answer to that claim, in itself, but it is relevant to the question whether that quarry is sufficiently connected with MDL's activities that a breach of the no conflict or no profit rule is established, in respect of its acquisition by RKM and Kurdeez Minerals. Mr

Bedrossian acknowledges, in closing submissions, that the primary question in respect of the Robert Murdoch Interests' liability in the claim in respect of the Timboon quarry is whether the fiduciary or statutory duties of Robert and Stephen extended to the circumstances of the acquisition of that quarry or, as he puts it, whether the acquisition of the Timboon quarry was a matter that was "sufficiently in the same ball park" as the business conducted or potentially conducted by MDL, referring to the authorities which I have noted in paragraphs 120ff above. I interpolate that that question needs to be answered, not in isolation or on the basis that MDL was the only trading entity within the Murdoch Group, but by determining whether that acquisition was sufficiently in that ball park in respect of MDL, having regard to the fact that Robert and Brian also owned interests in quarries in their own right and through other entities.

209 In opening submissions, Mr Kelly submitted that the claim in respect of the Timboon quarry failed because the opportunity was not within the scope of duties owed to MDL. He submitted that Robert and Brian conducted quarrying activities though several corporate entities, each conducting separate operations, including WJM, incorporated in 1983 and conducting the Mt Knowles quarry; MDL, incorporated in 1996, conducting the Buckaroo Lane quarry; MSC, incorporated in 2002, operating a quarry near Oberon; Ezylime Pty Ltd, incorporated in 2002 in partnership with a third party, operating a limestone quarry at Parkes; Mid Coast Lime Co Pty Ltd, incorporated in 2002 in partnership with a third party, which purchased land for a limestone quarry at Kempsey; and Stonekiln Pty Ltd, incorporated in November 2008, to supply a form of dolomite.

210 In closing submissions, Mr Kelly submits that the acquisition of the Timboon quarry was not within the scope of any fiduciary duty owed to MDL because particular ventures were acquired through single purpose corporate entities and MDL was not the vehicle through which subsequent ventures were pursued and conducted, and any duty in respect of the acquisition of Timboon would have been owed to "members of the de facto partnership" for which the Robert Murdoch Interests contend rather than to MDL. Mr Kelly also submits that there was no real and sensible possibility of conflict in respect of the acquisition of the Timboon quarry, when Robert and Stephen decided to

proceed with it, because Brian had by then inspected the quarry and formed his own view that it was not a suitable investment for MDL. I have referred to the evidence of Brian's views as expressed in cross-examination above, and the uncertainty in the evidence as to whether he had inspected the Timboon quarry. Although it is not strictly necessary to decide this question, I am inclined to think that that matter would not have excluded a conflict of interest, had it otherwise arisen, because Brian's view would have been formed without full disclosure of the matters relating to RKM's acquisition of the interest in the quarry.

211 I have referred above to the case law that addresses the application of the no conflict and no profit rules in respect of the diversion of a "corporate opportunity". I am not persuaded that the scope of Robert's or Stephen's statutory and fiduciary duties owed to MDL extended to the acquisition of other limestone mines, at least outside the Mudgee area. I have referred in the chronology above to the acquisition of several quarries by several companies and persons connected with the Murdoch Group. Although the mine acquired from IMA was operated by MDL, the alaskite quarry at Oberon was operated through MSC rather than MDL. As I also noted above, later quarry acquisitions by members of the Murdoch family included Stoneco's acquisition of the Timor quarry in the Hunter Valley in New South Wales; Brian's and Robert's personal acquisition of an interest in the Bylong quarry as to which Robert and Brian purchased a 50% interest in October 2009 and the balance on 31 January 2013, and MDL entered into a lease of the quarry in October 2009; Stoneco's acquisition of interests in the Braeside and Robertson's Knob quarries; and, at about the same time, RKM's and Kurdeez Lime's acquisition of the Timboon quarry land and business. Robert's evidence also addresses the range of rock types and products lines for the main Murdoch Group quarries (Robert 20.11.17 [119]). As Mr Kelly points out, Brian's affidavit evidence (Brian 6.7.17 [15], [17], [57], [124], [133], Brian 28.3.18 [26]) also referred to the acquisition and operation of businesses by the Murdoch Group, rather than treating MDL as the entity which would necessarily acquire such a business and Scott also referred to the acquisition of quarrying projects and other business in the Murdoch Group rather than specifically in MDL (Scott 6.7.17 [50], [66], and

29.3.18 [104]). It seems to me that this evidence implicitly, and rightly, recognises that it is not more probable than not that an asset such as the Timboon quarry would have been acquired by MDL, rather than by Brian or Robert personally or by another special purpose company in which they held shares.

212 Mr Bedrossian submits that the Murdoch Group's limestone activities were generally conducted in MDL, and mining activities in other minerals in other companies, and that it would be "logical" that any further limestone mine would be acquired by MDL rather than by Brian and Robert personally, or BPPL and RKM, or another company in the Murdoch Group. The first aspect of that proposition is consistent with the evidence to which I have referred above, but equivocal where MPL conducted those activities from the Mudgee site and other companies conducted other activities from other sites. It does not seem to me that any "logic" of that proposition is sufficient to extend Robert's or Stephen's duties, or Brian's and Scott's duties, to MDL to any acquisition of any limestone mine anywhere in Australia, given the evidence as to the pattern of quarry acquisitions in other entities.

213 The Robert Murdoch Interests in turn rely on the conduct of Scott and Stoneco in the acquisition of quarries, which was known to Brian and to MDL, as conduct that Scott (and Brian and MDL) assumed that Scott was entitled to undertake, consistent with a common assumption of all parties that they were "free to pursue independent activities including activities such as those at Braeside which were in competition with MDL's business". While I do not accept that proposition in respect of the whole of MDL's business, and the provision of crushing services in particular, I accept that the evidence of Scott and Stoneco's acquisition of quarries reinforces the view that the acquisition of quarries was not within the scope of any duties owed by Robert and Brian, or Scott and Stephen, to MDL, consistent with the matters to which I have referred above. I also accept that, as Mr Kelly points out, it would be highly unlikely that both Scott and Stephen, with the support of each of Brian and Robert, about the same time each engaged in a significant breach of fiduciary duty owed to MDL, by each acquiring a different quarry that each of them understood should properly have been acquired by MDL.

214 It seems to me that there was no consistent historical pattern of the acquisition of other limestone mines, still less mines outside the Mudgee area, by MDL and no evidence of any discussion between Robert and Brian of any intended extension of the scope of MDL's business of operating quarries outside the Mudgee area. The business of MDL and associated companies had been conducted for a considerable time on the basis that Brian, Robert and their sons could and did acquire quarrying and other interests outside MDL. The contrary view seems to me to be wholly implausible, where the interest in the Bylong quarry was acquired by Robert and Brian personally rather than MDL, although MDL conducted quarrying activities on it; Stoneco acquired the Timor quarry, without objection by MDL but also without its consent; Stoneco subsequently acquired the Braeside and Robinson Knobb's quarries, again without MDL's consent; and RKM and Kurdeez Minerals subsequently acquired the Timboon quarry; and it is highly unlikely that reach of Brian, Robert, Scott and Stephen at various times undertook these acquisitions in breach of their respective obligations to MDL or other companies within the Murdoch Group. While I do not accept the Robert Murdoch Interests' claim that the obligations of the parties to MDL had ceased in 2009 by reason of the separation discussion, it seems to me that the parties had not treated the opportunity to undertake quarrying, or lime and dolomite quarrying, or lime quarrying, as available only to MDL. This opportunity also did not come to Robert or Stephen in any capacity associated with MDL.

215 Where the opportunity to develop the Timboon quarry was not within the scope of MDL's business or any contemplated expansion of it, and not within the scope of Robert's of Stephen's fiduciary or statutory duties, there was no real and sensible possibility of a conflict between duties to MDL and their personal interests in developing the Timboon quarry or their respective duties to RKM and Kurdeez Minerals and no breach of their fiduciary or statutory duties is established. I do not neglect the facts that, as Mr Bedrossian points out, the Timboon quarry was later used as a point of sale for dolomite from MDL; or that Robert later used the association with the Murdoch Group business, and possibly MDL, to promote the Timboon quarry business and provided contact information for Murdoch Group or MDL staff in respect of the business; or may

have later used MDL's assets or staff in respect of the Timboon quarry. It does not seem to me that these matters assist MDL in establishing the relevant breach, where an acquisition which was not in breach of duty, at the time it occurred, could not become an acquisition in breach of duty because of later steps later taken to exploit the mine, even if they involved any breach of duty to MDL. Those steps were not relied on to establish any separate breach of duty.

216 I also note, for completeness, that the Brian Murdoch Interests point out the Robert Murdoch Interests' defence to the claim in respect of the Timboon quarry is a denial, and that the Robert Murdoch Interests do not expressly plead Brian's consent to their taking up the opportunity, and their defence of consent is specifically directed to the claim in respect of the Cadia mine. Nonetheless, Brian and Scott were cross-examined at length as to matters relating to such consent, without objection by Mr Bedrossian. It is not necessary to determine whether that defence would be available, where it was not pleaded but the hearing was conducted as if the matter was in issue, given the findings that I have reached on other grounds.

217 Mr Bedrossian also addressed the decision in *Queensland Mines Ltd v Hudson* above, to which I referred in the course of the hearing, at length in closing submissions. Mr Bedrossian submits, with considerable force, that the fact that a director and shareholder would not have supported the pursuit of an opportunity was not found to be an answer to a diversion of corporate opportunity in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 19 ACLC 856; [2001] NSWCA 97 at [122], where the information made available to that director and shareholder was not sufficient to support a finding of fully informed consent. While Mr Bedrossian's submissions as to these matters are comprehensive and helpful, it is not necessary to address that decision at any length, where I have found that the acquisition of the Timboon quarry was not within the scope of the relevant duty, as distinct from finding consent to that acquisition arising from Brian's expressed disinterest in it. On balance, I would have accepted that Brian's attitude would not have been sufficient to avoid a breach of duty, had that acquisition of the Timboon quarry been within the scope of the relevant duties.

*MDL's claims for knowing involvement*

218 MDL also pleads (FASC [43A]) that, so far as Robert and Stephen were directors of RKM and Stephen was a director of Kurdeez Minerals at the time that any of the pleaded conduct occurred, Stephen was relevantly involved in, for the purposes of s 79 of the *Corporations Act*, Robert's alleged breaches of his duties to MDL pursuant to ss 180-183 of the *Corporations Act.* MDL also pleads that Robert was a person relevantly involved in, for the purposes of s 79 of the Corporations Act, Stephen's alleged breaches of his duties to MDL pursuant to ss 180-183 of the *Corporations Act*. MDL again pleads (FASC [44]) that, so far as Robert and Stephen were directors of RKM and Stephen was a director of Kurdeez Minerals at the time that any of the pleaded conduct occurred, each of RKM and Kurdeez Minerals were relevantly involved in, for the purposes of s 79 of the *Corporations Act*, Robert's and Stephen's breaches of the duties which they each owed to MDL pursuant to ss 180-183 of the *Corporations Act*. These claims cannot succeed where the pleaded breaches of statutory duty were not established against Robert or Stephen in respect of the acquisition of the Timboon quarry.

219 MDL also pleads (FASC [44A]) a claim for knowing receipt against RKM, so far as Robert and Stephen were directors of RKM at the time any of the pleaded conduct and (FASC [44B]) a claim for knowing receipt against Kurdeez Minerals, so far as Stephen was a director of Kurdeez Minerals at the time of the pleaded conduct. This claim cannot succeed where the relevant breach of duties was not established against Robert or Stephen in respect of the acquisition of the Timboon quarry.

*MDL's claimed loss*

220 MDL pleads (FASC [45]) that, by not acquiring the quarry land, licence and quarry equipment for the Timboon quarry, it has suffered loss and damage; that (FASC [46]) Robert and Stephen are liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL, and that RKM and Kurdeez Minerals are liable to pay compensation pursuant to s 1317H of the *Corporations Act* and equitable compensation to MDL and are also liable to account to MDL for all assets acquired and all profits derived by

each of them as a result of their acquisition, ownership and utilisation of the quarry land, licence and/or equipment. These claims are not established given the findings that I have reached above. I should nonetheless briefly address, for completeness, the parties' submissions and the expert evidence as to MDL's claimed loss in respect of the claim relating to the acquisition of Kurdeez Lime and the Timboon quarry, although it is not necessary to reach any final view as to that evidence given the conclusions that I have reached above.

221 Mr Bedrossian points out that MDL had not yet made an election as to whether it would seek compensation or an account of profits in respect of the Timboon quarry. He submits that MDL's claim consists of two components, namely historical realised profits and future anticipated profits, and refers to the expert evidence in that respect. In closing submissions, Mr Bedrossian noted that historical realised profits in respect of the Timboon quarry were addressed in the accounting expert evidence of Mr Ashby (led by the Brian Murdoch Interests) and Mr Mullins (led by the Robert Murdoch Interests). Mr Mullins accepted (Ex D14, [2.16]-[2.17]) that, if royalty payments made by Kurdeez Minerals to RKM were not deducted as an expense, Mr Ashby has correctly calculated realised profits from the Timboon quarry as $2,356,910. It appears to be common ground that the "royalty" payments were not costs of production in respect of the Timboon quarry's operations but were a means of distributing the income from the venture between Kurdeez Minerals and RKM. It may be that nothing would have turned on the question whether royalty payments to RKM would be deducted where RKM would be required to account for the receipt of them, if MDL had established its claim against RKM and elected for an account of profits.

222 Mr Bedrossian also submitted that future profits from the Timboon quarry were addressed in the evidence of Mr Hocking (led for the Brian Murdoch Interests) and Mr Dupont (led for the Robert Murdoch Interests). There were differences between those experts, or at least between their instructions, as to the approach to be adopted in respect of the treatment of future profits, where Mr Dupont was instructed to address and addressed the value of that quarry (T515-516), and Mr Hocking assessed the amount of future maintainable profits of the quarry when operated by RKM or Kurdeez Minerals (T516).

223 Mr Hocking, whose expertise is (as I noted above) as a valuer of real property including mining assets, calculated the present value of the future anticipated profits of the Timboon quarry on the basis that Kurdeez Minerals had sustainable earnings before interest and tax of $450,000 per annum, to which Mr Hocking applied a 10% discount rate and initially assumed an operating life of 20 years, before amending his position to assume an operating life of 30 years, although he had not been provided with a geologist's report as to the extent of resource that was present on the site.

224 In his report dated 6 June 2019 (Ex P3), Mr Hocking indicated that he sought to value the Timboon quarry by projecting future earnings before income and tax. He calculated the total amount of profit derived by RKM or Kurdeez Minerals during the period of the operation of the quarry, to the date of his report, as $3,336,052 and estimated the present value of future profit from the mine as in the order of $3.8 million, then on the basis of an operating life of 20 years. His approach assumed the correctness of resource "estimates" contained in a draft 2008 mine plan, but there was no evidence that established that matter, and the reference to resource estimates in his report were admitted with limiting orders under s 136 of the *Evidence Act* and do not establish the fact of those resources. I recognise, of course, that an inference is available that a limestone resource presently exists at the Timboon quarry, so far as there is presently an operating limestone quarry at the site, but that is a different matter from the extent and duration of the lime resource at that quarry. Mr Hocking also expressed opinions as to whether MDL had sufficient financial resources to undertake relevant transactions in respect of the mine and as to whether it was in MDL's best interests to acquire the mine; he was not qualified to address either question and his evidence in that respect was rejected.

225 The Robert Murdoch Interests relied on the report dated 25 February 2020 of Mr Michael Cooper in respect of the Timboon quarry (Ex D9) and the Brian Murdoch Interests tendered (Ex P9) certain paragraphs of that report which had not been tendered by the Robert Murdoch Interests. Mr Cooper is a civil engineer and has expertise in quarry operations, although he acknowledged in the joint expert report (to which I refer below) that he was not qualified as a valuer. He referred to matters including uncertainty as to the quantum and

quality of limestone reserves at the quarry, uncertainty as to future processing costs and the financing costs of a rehabilitation bond that he considered were risks to the value of the Timboon quarry. He also addressed the question of the effective working life of the Timboon quarry in its present condition, although his evidence relied on a proposed mine plan and discussions with a consultant who was preparing it which were not otherwise proved by admissible evidence. Mr Cooper expressed the view that only a small quantity of extractable resource remained available from the currently approved extraction area at the Timboon quarry. He also identified significant risks which he considered existed when RKM purchased the Kurdeez Lime business and the land in 2011, including that an operating licence and work authority was not transferred from the previous owner to Kurdeez Lime and has not now been transferred from Kurdeez Lime to Kurdeez Minerals, and the position as to a work authority bond which needs to be held in respect of future rehabilitation and remediation requirements in respect of quarry workings that attach to the current operator of the Timboon quarry.

226 The parties in turn tendered a joint expert report of Mr Hocking and Mr Cooper (Ex P5) in respect of the Timboon quarry. Mr Cooper again there summarised areas of uncertainty in relation to the future profit from the quarry (Ex P5, [32]), again including uncertainty as to the quantum of reserves, in the absence of a reserves assessment complying with the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves ("JORC Code"); uncertainty as to the quality of the reserves; uncertainty as to market pricing for the products yielded; costs of removal and re-handling of overburden and other unsuitable materials and disposal or placement of those materials; likely future processing costs; ongoing financing costs of a rehabilitation bond, once the amount of that bond was finalised by the regulator; and a provision for actual costs of final remediation of the site, assuming the bond is subsequently recovered in full.

227 The Robert Murdoch Interests also relied on a report dated 14 February 2020 of Mr Dupont (Ex D6) addressing questions in respect of Mr Hocking's report as to the Timboon quarry and providing a "desktop" valuation of that quarry. Mr Dupont had not inspected that quarry and his comments were limited to an

evaluation of Mr Hocking's report. He also indicated that he had been provided with a letter dated 22 January 2020 addressing the current status of approvals and resources at the Timboon quarry, but those matters were also not proved by admissible evidence. Mr Dupont expressed the view, not surprisingly, that the absence of a revised and approved mine operating plan would have a significant effect on the saleability and possibly ongoing viability of the Timboon quarry, and he calculated, from information contained in Mr Hocking's report, that existing resources would be exhausted in approximately nine years and expressed the view that a new operating plan would have to be prepared and the rehabilitation bond increased for the quarry to continue. He noted that Mr Hocking had made no allowance for those costs in projecting the potential future income of the quarry.

228 Mr Dupont agreed with Mr Hocking that a discounted cashflow analysis, by reference to projected income, was a commonly accepted methodology for the valuation of extractive industries but noted that the discount rate adopted in Mr Hocking's report, at 10%, was at the lowest end of discount rates for extractive industries and expressed the view that it failed to take into account the inherent future risks of the Timboon quarry. Mr Dupont adopted a discount rate of 13.5% and reached a significantly lower present value of approximately $1.689 million. It is not necessary to reach a finding as to which approach is correct given the conclusions I reach on other grounds.

229 By a further report dated 24 April 2020 (Ex P6), Mr Hocking responded to aspects of Mr Cooper's and Mr Dupont's reports. Mr Hocking's response to Mr Cooper's report largely related to matters outside his expertise, and was admitted with limiting orders under s 136 of the *Evidence Act* partly as submission; partly as assumption, in respect of matters which were largely not proved; or rejected so far as neither Mr Hocking's expertise qualifying him to give the evidence nor any process of reasoning to support it were established. Mr Hocking's response to Mr Dupont's report extended his earlier analysis by reference to the financial statements for Kurdeez Minerals for the year ended 2018 and its draft financial statements for the year ended 30 June 2019 and expressed the view (which seemed to me to be no more than informed speculation) that it was unlikely that a work plan variation would increase the

rehabilitation bond from $35,000 to $589,000 and, on that basis, he omitted that bond from his calculations. He acknowledged that a financial burden in respect of such a bond would be incurred by Kurdeez Minerals, but the effect of his approach was that it was not reflected as a cost in respect of the quarry.

230 Mr Hocking also there indicated that the discount rate of 10% that he had adopted reflected that he had been instructed to arrive "at the present value of future profit to the existing operator for the purposes of potential loss assessment between the parties in dispute". It seems to me that a discount rate would ordinarily reflect the risk of a project, and I am not persuaded that there is, as Mr Hocking's approach requires, a difference between the value of future earnings from the perspective of an incoming operator and the perspective of the current operator, so that the same income stream can have different values in different hands. It also seems to me that that approach depends on an unproved and unprovable assumption that the present operator has skills or industry experience that an arm's length purchaser of a quarry would not have. Mr Hocking does not offer any other justification for the adoption of the 10% discount rate as distinct from the 13.5% rate proposed by Mr Dupont. Mr Hocking also contends there is an error in Mr Dupont's calculations, which I need not address given the findings that I have reached on other grounds.

231 The parties also relied on a joint report dated 30 August 2020 of Mr Hocking and Mr Dupont (Ex P7). Mr Hocking there reiterated that his opinions and calculations were to assist the Court in determining a claim for "damages" between related parties and that he assumed that the current quarry operator would remain in place and have an intimate knowledge of relevant matters at the quarry, compared to an arms' length purchaser under sale conditions and this was reflected in a lower risk investment and underpinned his 10% discount rate. Mr Hocking and Mr Dupont agreed to an adjustment in wages expenses and Mr Dupont made a further allowance for the cost of obtaining a mine operation plan and rehabilitation bond, which it seems to me should be accounted for as identified and probable future expenses. Mr Hocking referred to an increased mine life of 30 years and Mr Dupont there adopted an "industry standard" mine life of 20 years.

232 The use of 20 or 30 year estimates of the life of the Timboon quarry, not supported by a geological report as to the extent of the limestone resource at the quarry, fell well short of the approach contemplated by a 2008 article (Ex D15) written by Mr R Hocking (Mr M Hocking's father and then a director of the firm with which Mr Hocking is now associated), which observed that the timeframe for the capitalisation of earnings before interest and tax should reflect the life of a quarry, up to but not greater than 30 years "*after taking into consideration the geological estimates of the resources*, the volume of usable reserves, and all the elements of risk in meeting the budget forecasts over the term used" (emphasis added) and also emphasised that a geological report was required "in almost all circumstances", and "a competent report would provide a valuer with not only the total volume of the reserves, but the expected volumes suitable for extraction and sale, together with estimates of overburden", being the material which needed to be excavated in order to access a resource.

233 I have real reservations as to whether a sufficient evidentiary basis for the estimates of the life of the Timboon quarry was established, although Mr Bedrossian sought to support the 30 year estimate by reference to an analysis of Mr Cooper's evidence and the draft "estimate" of resources at the mine made in 2002, combined with Mr Bedrossian's calculation of the extent to which those "estimated" resources would have been depleted by mining activity since that estimate was made. However, it is not necessary to reach a final view as to this issue or other quantification issues in respect of this claim further where MDL has not established the basis of this claim, on the findings that I have reached above. The Brian Murdoch Interests again contended that interest would be payable on the profits as derived. It is also not necessary to address that question where MDL has not established this claim.

*MDL's claim for a constructive trust in respect of the Timboon quarry*

234 MDL also pleads (FASC [47]) that RKM and Kurdeez Minerals hold the Timboon quarry land, licence and equipment on trust for MDL and (FASC [48]) that Stephen holds, or is liable to have it declared by the Court that he holds, his shareholding in Kurdeez Minerals on trust for MDL and is liable to be

ordered to transfer that shareholding to MDL. It is not apparent that this claim was pressed and, if it was, it is also not established given the findings that I have reached above.

*MDL's claims for declaratory relief*

235 MDL seeks a declaration, under s 1317E of the *Corporations Act*, that Robert breached his duties to MDL pursuant to ss 180, 181, 182 and/or 183 of the *Corporations Act* and breached his fiduciary duties to MDL. No declaration of a contravention of those provisions of the *Corporations Act* should be made under s 1317E of the *Act*, since the balance of authority indicates that that section only applies to proceedings in which relief is sought by the Australian Securities and Investments Commission: *One.Tel Ltd (in liq) v Rich* (2005) 190 FLR 443; 53 ACSR 623; [2005] NSWSC 226 at [69]–[70]; *Primacy Underwriting Agency Pty Ltd v Kilborn* (2007) 25 ACLC 160; [2007] NSWSC 158 at [6]–[8]. I do not consider that such a declaration should be made in respect of any breach of fiduciary duty where it would be merely anterior to other relief.

236 MDL also seeks a declaration that Stephen was, at all times material to these proceedings, an officer of MDL within the meaning of that term in s 9 of the *Corporations Act* and for the purposes of sections 180, 181, 182 and 183 of the *Corporations Act* and a declaration, pursuant to s 1317E of the *Corporations Act*, that Stephen breached his duties to MDL pursuant to ss 180, 181, 182 and/or 183 of the *Corporations Act* and his fiduciary duties to the Plaintiff; and/or his contractual duties to the Plaintiff. This declaration should not be made for the reasons I would not have made such a declaration in respect of Robert.

237 MDL seeks declarations that Stephen, RKM, Tilecote and Kurdeez were involved, within the meaning of s 79 of the *Corporations Act*, in Robert's alleged breaches of his duties pursuant to ss 181, 182 and/or 183 of the *Corporations Act*, and aided, abetted or assisted in his breaches of his fiduciary duties to MDL; and that RKM, Tilecote and Kurdeez Minerals were involved, within the meaning of s 79 of the *Corporations Act*, in Stephen's alleged breaches of his duties pursuant to ss 181, 182 and/or 183 of the *Corporations*

*Act*, and aided, abetted or assisted in his breaches of his fiduciary duties to MDL. I would not make declarations in that form, which are again anterior to other claims of relief.

238 MDL also sought a declaration that Robert was involved, within the meaning of s 79 of the *Corporations Act*, in Stephen's breaches of his duties to MDL pursuant to ss 180, 181, 182 and/or 183 of the *Corporations Act*, and aided, abetted or assisted in Stephen's breaches of his fiduciary duties to MDL. I would not make that declaration for the reasons I would not have made the other declarations sought by MDL.

*The Robert Murdoch Interests' claim for relief under s 1318 of the Corporations Act*

239 The Robert Murdoch Interests also seek (Defence [4MA]) relief under s 1318 of the *Corporations Act*, although not under s 1317S of the *Act* in respect of the civil penalty claims brought against them. Section 1318 allows a court to relieve, relevantly, an officer of a corporation from liability in civil proceedings for negligence, default, breach of duty or breach of trust, if he or she establishes that he or she acted honestly, and that he or she ought fairly to be excused for the negligence, default, breach of duty or breach of trust having regard to all of the circumstances of the case including those connected with his or her appointment. In *Daniels v Anderson* (1995) 37 NSWLR 438 at 525, Clarke and Sheller JJA observed that a corresponding section allows the court:

> "to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision-making."

240 Matters relevant to relief under these sections include whether the defendant acted honestly; a value judgment whether, having regard to all the circumstances of the case, the defendant ought fairly to be excused for the contravention; and whether, as a matter of discretion, the court should exercise its power to relieve the defendant from any liability: *Australian Securities and Investments Commission v Edwards (No 3)* (2006) 57 ACSR 209; [2006] NSWSC 376 at [10]; *Australian Securities and Investments Commission v Healey (No 2)* (2011) 85 ACSR 654; [2011] FCA 1003 at [83]–[84]; *Great*

*Southern Finance Pty Ltd (in liq) v Rhodes* [2014] WASC 431 at [60]; *Re Swan Services Pty Ltd (in liq)* [2016] NSWSC 1724 at [236]-[237].

241 Mr Kelly points out, and I accept, that there are three stages in an inquiry under s 1318 of the *Act*, namely whether the applicant for relief has demonstrated that he or she acted honestly; whether, having regard to all the circumstances of the case, that person ought fairly be excused; and whether relief from liability should be ordered wholly or partly and, if partly, to what extent: *Morley v Australian Securities and Investments Commission (No 2)* (2011) 83 ACSR 620; [2011] NSWCA 110 at [44], [49]-[50]; *Great Southern Finance Pty Ltd (in liq) v Rhodes* above at [60]. I accept that whether a person is acting honestly will depend on whether he or she acted with moral turpitude, deceit or conscious impropriety, or without an intent to gain an improper benefit or advantage: *ASIC v MacDonald (No 12)* (2009) 73 ACSR 638; [2009] NSWSC 714 at [22]. The case law establishes that person may fail to act honestly within the meaning of this section although they did not have a subjective intention to deceive: *Australian Securities and Investments Commission v MacDonald (No 12)* above at [18]-[19]; *Australian Securities and Investments Commission v Healey (No 2)* above at [88]. Whether relief from liability should be granted under these sections depends not only on subjective honesty but also on the degree to which the relevant conduct fell short of the required standard, the seriousness of the contravention and its actual or potential consequences, any element of impropriety such as deception and personal gain and any contrition of the applicant and the need for general deterrence is also relevant: *Morley v Australian Securities and Investments Commission (No 2)* above; *Ashrafinia v Ashrafinia* [2013] NSWSC 1442 at [252].

242 I am satisfied that the nature and extent of the diversion of revenue from MDL to RKM and BPPL in respect of the Cadia Mine at least involved an intent to gain an improper benefit or advantage, undertaken in a substantial conflict of interest, notwithstanding that Robert and Stephen may have persuaded themselves that the diversion of revenue previously earned by MDL to their companies was justified. Mr Bedrossian points out, in closing submissions, that the equipment rental agreement between BPPL and MDL (Ex J1, B1045) at least raises a question as to the honesty of the relevant arrangements,

although it is not necessary to go so far as to accept Mr Bedrossian's submission that it constituted a "very poor attempt to obscure the true owner of equipment used at the Cadia Mine site". At the least, that agreement did not provide a fair record of the substance of the arrangement between RKM and BPPL on the one hand and MDL on the other, where BPPL largely did not own the equipment that it there claimed to own and to lease to MDL. Mr Bedrossian also relies on the circumstances of the sale of the crusher known as "Big Wings" from RKM to MDL but I cannot find that that sale was at overvalue, as distinct from again undertaken in a substantial conflict of interest affecting Robert. I do accept that the false representation made by Brian and Stephen to CVO that BPPL was a subsidiary of MDL, in discussions as the possible concentrator contract, involved deliberate and material dishonesty on the part of both Robert and Stephen. There is no hint of contrition on the part of Robert, Stephen or their companies, and no attempt has been made to compensate MDL for its loss. It does not seem to me that the basis for relief of Robert, Stephen or their companies from liability has been established.

**The second derivative proceedings brought by Robert and Stephen**

243 By an Originating Process and a Statement of Claim both filed on 13 December 2017, Robert and Stephen seek a series of declarations, including that the relationship of trust and confidence or family partnership or joint venture between several persons had ceased from 20 November 2009 and that, from that date, Brian, Scott, Robert and Stephen and associated companies were "free to pursue new business opportunities" including of the same or a similar type carried out by the several companies and/or "the family partnership and/or joint venture" between several persons and companies. Alternatively, by a derivative claim, Robert and Stephen cause MDL, WJM and MSC bring an apparently "tit for tat" claim that conduct of Scott and/or Stoneco was in breach of fiduciary duty, in breach of Brian's statutory duties owed to MDL and other companies and in breach of Scott's duties owed to MSC. They also bring claims for knowing involvement and knowing receipt and in relation to Scott's salary and benefits. In opening submissions, Mr Kelly noted that the second derivative proceedings primarily relied on matters raised by the Robert

Murdoch Interests in their defence to the first derivative proceedings brought by the Brian Murdoch Interests. I have addressed those matters above.

244 Robert and Stephen plead (SOC [32]) that Robert performed, or caused to be performed, specified acts and accepted Brian's involvement in these acts on the basis of a joint understanding between Robert and Brian regarding a common business based on specified propositions, including that Robert, Brian, MDL and WJM were to operate a business, in common, involving the operation of quarries, stone crushing and the sale of stone products with a view to profit; that MDL and WJM would remain as separate corporations but would operate as a part of a family partnership or joint venture; and:

> "That the common business as a whole was either a joint venture, or a partnership within the meaning of Part 2, Division 1 of the Partnership Act 1898 (NSW), or both a partnership and a joint venture, between:
>
> i. Robert and Brian; and
>
> ii. between each of Brian and Robert on the one part; and MDL and WJM and (respectively Robert or Brian) on the other part."

245 Robert and Stephen also plead (SOC [33]ff) several matters directed to Robert's contribution to the expansion and success of the business, overlapping with their Defence to Brian's derivative claim, and plead the circumstances of Brian's, Robert's, Scott's and Stephen's work in the relevant companies and the acquisition of several properties by the companies "in the belief and on the basis of an understanding that they were to be used as part of the [pleaded] family partnership or joint venture" and that they were used in that manner. They then plead (SOC [44]ff) matters relating to the incorporation of MSC and the business it conducted. They plead (SOC [54]) that:

> "At all material times from at least 2002 to at least 2007, to the knowledge of and with the consent and participation of each of Brian, Robert, Scott and Stephen —
>
> (a) The businesses of WJM, MDL and MSC were managed and operated together as a group ("Core Murdoch Group") and as part of the family partnership or joint venture ….
>
> (b) MDL expanded its business into the provision of mobile crushing services to external parties."

Robert and Stephen in turn plead that Robert was General Manager or Managing Director of the companies in the Core Murdoch Group; Brian was

the Operations Manager of the Core Murdoch Group and statutory Production Manager for WJM; Scott was statutory Production Manager for MSC; Stephen was the statutory Production Manager for MDL; and Scott had the authority to act for each company in the group in several respects. The Brian Murdoch Interests respond (Defence [54]) that the businesses of WJM, MDL and MSC were managed and operated by broadly the same persons and broadly as a group and admit some aspects of this paragraph.

246 In a pleading that is plainly modelled on the Brian's first derivative action, with a twist, Robert and Stephen plead and cause MDL, WJM and MSC to plead (SOC [55]-[56]) that, from about 1997 to at least 2007, there existed a relationship of mutual trust and confidence between Robert, Brian, Scott and Stephen in relation to the conduct of the affairs of each of WJM, MDL and MSC as part of the pleaded "family partnership or joint venture"; each of WJM, MDL and MSC as part of the family partnership or joint venture were conducted by Robert, Brian, Scott and Stephen in a cooperative manner; and, from at least 2002, and as part of the pleaded family partnership and/or joint venture, Brian and Scott owed fiduciary duties to each of WJM, MDL, MSC and to Robert and Stephen, not to place themselves in a position where their duties to those companies and the family partnership conflicted with their personal interests; and not to obtain any unauthorised profit by reason or by use of their fiduciary position or by reason of any opportunity or knowledge resulting from it. The evidence, by way of conversations, documents, or practices, does not support the existence of a wider structure, beyond the ad hoc arrangements by which the family members worked together, usually in company structures, and occasionally in single entities, in respect of property development or quarries owned personally by Brian and Robert, or later individually. There is no reason to infer or imply a wider arrangement of that kind, where any applicable duties already arise within the relevant companies or the particular ventures. I am also not satisfied that any such wider enterprise existed as a partnership or joint venture, so as to give rise to fiduciary duties of that character, potentially in conflict with any such duties owed to the particular companies.

247 Alternatively, MDL, WJM and MSC plead (SOC [57]) and the Brian Murdoch Interests admit that Brian owed statutory duties under ss 180-182 of the

*Corporations Act* to WJM, MDL and MSC. They also plead that Scott was an officer of each of those companies and owed statutory duties under ss 180-182 of the *Corporations Act* to those companies. That has not been established, given the relatively limited role that Scott had in the relevant companies in the relevant period, and the fact that Scott did not make a concession corresponding to that made in closing submissions by Mr Kelly on Stephen's behalf. The Robert Murdoch Interests do not plead any duties applicable under ss 182-183 of the *Corporations Act* to Scott as an employee of any of the companies.

248 Robert and Stephen in turn plead, and cause MDL, WJM and MSC to plead matters which they contend brought about the end of the "joint understanding", as follows:

> "62. Over the period from 2007 to November 2009, differences began to arise between Robert and Stephen on the one hand, and Brian and Scott on the other hand, in connection with the conduct of the business of the Core Murdoch Group.
>
> 63. On 20 November 2009, a meeting took place between Robert, Stephen, Brian and Scott at which it was resolved that MDL, WJM, MSC and other interests in companies and land jointly controlled by Brian and Robert be split up, in a manner to be further determined, as between (i) Brian and Scott on the one hand; and (ii) Robert and Stephen on the other hand.
>
> 64. By reason of the events pleaded in paragraphs 62–63, from 20 November 2009 —
>
> (a) the relationship of mutual trust and confidence between Robert, Brian, Scott and Stephen ceased; and
>
> (b) the family partnership or joint venture and the joint understanding for the work conducted by Robert, Brian, Scott, Stephen, WJM, MDL and MSC as a family partnership or joint venture, as pleaded in paragraph 32 and, conducted in the manner pleaded above between paragraphs 33 and 54, had also ceased;
>
> (c) Each of Brian, Scott, Robert and Stephen believed and thereafter acted on the understanding that each of them (or companies controlled by each of them, such as BM, Stone[c]o, RKM and [BPPL]) was free to pursue new business opportunities, including business opportunities of the same or similar type carried out by WJM, MDL and/or MSC and the family partnership or joint venture."

249 They in turn seek declaratory relief to that effect. It is not necessary to determine the bulk of this claim, because I have not found the pleaded "joint

understanding" to have been established beyond the arrangements that existed within the relevant companies and individual ventures, and it is therefore not necessary to determine whether it ended. The matter pleaded in paragraph 64(c) has not been established, prior to a separation of the businesses, and would not in any event have been an answer to Robert's (or Brian's) statutory duties to the relevant companies.

250 In paragraphs 66ff of their Statement of Claim, Robert and Stephen cause MDL, WJM and MSC to pursue an expressly contingent claim if, inter alia, the Court did not make the declaratory relief which they sought (which has occurred) and found for MDL and against the Defendants in Brian's derivative proceedings (which has occurred in part). They plead (SOC [68]-[70]) Scott's purchase of two crushing machines from 2009, his taking up a crushing opportunity in South Australia in 2010, and Stoneco's acquisition of the Braeside basalt quarry, which they contend was a "direct competitor to MDL's business of supplying basalt products from the Bylong quarry owned by Robert and Brian, and operated by MDL" and (SOC [71]) that:

> "Since about 2011, Scott and Stoneco have conducted a business of the same or similar type to that carried out by MDL by operating the Braeside Basalt [q]uarry in competition with MDL and Stoneco and has obtained work from customers serviced by MDL."

251 MDL, WJM and MSC further plead (SOC [72]) that, in or about 2011, "Scott through Stoneco" purchased a tracked mobile screening plant for the purposes of expanding the fleet of mobile crushing and screening machines to be used at the Stoneco Braeside basalt quarry and in Stoneco's mobile crushing and screening business, both being businesses of the same or similar type conducted by MDL. MDL, WJM and MSC also plead (SOC [73]) that, in about 2012, Scott personally and/or through Stoneco and with Brian Murdoch's financial assistance, pursued and undertook an independent business opportunity of the same or similar type carried out by the MDL by acquiring the Robertson's Knob quarry near Scone.

252 MDL, WJM and MSC plead (SOC [74]) that Scott undertook the pleaded actions with Brian's knowledge and consent. The Brian Murdoch Interests respond (Defence [74]) that Brian was aware of Scott's acquisition of a tracked

mobile impact crusher in 2009 and a tracked mobile impactor jaw crusher in September 2010; Stoneco's undertaking mobile crushing in South Australia in or about October 2010; Stoneco's acquisition of the Braeside basalt quarry sometime after 2011 and its thereafter operating a business in relation to that quarry; Stoneco's acquisition of a tracked mobile screening plant in 2011; and Stoneco's acquisition of the right to operate the Robertson's Knob quarry in or about 2012; and plead that:

> "Brian did not object to Scott undertaking the [pleaded] actions … in circumstances in which those opportunities and businesses were:
>
> (i) known to and disclosed to MDL (including by disclosure to Robert) and that MDL, and Robert, joined in the adoption of a position where there was no objection to Scott undertaking those actions; and/or
>
> (ii) were not opportunities and businesses competitive with MDL."

253 MDL, WJM and MSC in turn plead (SOC [75]) that the acts carried out by Scott and/or Stoneco pleaded in SOC [68]-[73] were, first, carried out by Scott and/or Brian in breach of their respective fiduciary duties as referred to in SOC [55]-[59]. This claim must fail, because the only relevant fiduciary duties are pleaded in SOC [56] as arising from the wider overarching family partnership or joint venture which I have held has not been established. MDL, WJM and MSC did not plead fiduciary duties owed to the particular companies or within individual ventures absent such a wider overarching arrangement.

254 Robert and Stephen also cause MDL, WJM and MSC to plead that these matters were in breach of Brian's duties to MDL and MSC, pursuant to ss 180-182 of the *Corporations Act.* This claim must also fail, since the claim depends on paragraph 68, which pleads steps taken by "Scott through Stoneco", not by Brian; paragraph 69, which pleads a step taken by Scott rather than Brian; paragraph 70 which again pleads an act of Scott or Stoneco, although it refers to Brian's financial assistance for it; paragraph 71 which pleads steps taken by Scott and Stoneco, not by Brian; paragraph 72 which pleads steps taken by "Scott through Stoneco", not by Brian; and paragraph 73 which again pleads an act of Scott or Stoneco, although it again refers to Brian's financial assistance for it. The identification of the pleaded acts, as carried out by Scott or Stoneco as distinct from Brian, cannot support an allegation that Brian breached the

pleaded duties, and there are no pleaded facts to support a claim that Brian's alleged financial assistance to two of those acts was a distinct breach of duty.

255 Robert and Stephen also cause MDL, WJM and MSC to plead that the relevant acts were in breach of Scott's duties to MSC, pursuant to ss 180-182 of the *Corporations Act*. This claim must also fail, because, even if the pleaded acts were carried out by Scott rather than Stoneco, MDL, WJM and MSC have not established that Scott was an officer of MSC for the purposes of s 9 of the *Act* so as to be subject to such duties; Scott, by contrast with Stephen, did not concede that matter; and the Robert Murdoch Interests did not rely on the duties owed by employees under ss 182-183 of the *Act*.

256 Robert and Stephen cause MDL, WJM and MSC to plead, again in what seems to be another "tit for tat" pleading, that Brian has, within the meaning of ss 79(a) and (c) of the *Corporations Act*, aided, abetted, or procured Scott's contraventions of his statutory duties or has been directly or indirectly knowingly concerned in the contravention of Scott's statutory duties. That claim fails because it has not been established or conceded that Scott was an officer of the respective companies so as to owe, or breach, the pleaded statutory duties. They also plead knowing receipt or knowing involvement in a breach of fiduciary duty against Stoneco, which cannot be established where they did not seek to establish fiduciary duties owed by Scott to the particular companies and did not establish fiduciary duties arising from a wider overarching partnership or joint venture. They also plead knowing involvement in a breach of statutory duties by Scott against Stoneco which is not established where that breach is not established.

257 Robert and Stephen cause MDL, WJM and MSC to plead (SOC [76]) claims for relief against Scott, Stoneco and Brian. At the commencement of the hearing on 18 August 2020, the Brian Murdoch Interests made a qualified concession in respect of this claim, as follows:

> "1. In the event that the Court determines that Robert Murdoch and Stephen Murdoch are liable in respect of the Timboon Quarry Claims in the First Derivative Proceedings, then the [Brian Murdoch Interests] accept that Scott Murdoch and Stoneco Pty Limited (but neither Brian Murdoch nor B Murdoch Pty Limited) likewise ought to be held liable in respect of the matters pleaded in the Second Derivative Proceedings at

paragraphs [76(a), (b), (e) and (f)] of the Statement of Claim (CB-A224 to CB-A225).

2. The above concession relates to liability only, not quantum."

258 This concession presumably reflected recognition that, if the Timboon quarry was within MDL's scope of business, then the Braeside quarry and Robertson's Knob quarry and associated activities were also likely within that scope of business. I have not reached that finding and the concession does not have effect. Robert and Stephen, MDL, WJM and MSC have not established their claim to relief on this basis, although that result partly reflects what is likely to have been a strategic decision to frame their claim for breach of fiduciary duty in a particular way, and not to plead the existence of fiduciary duties owed to the particular companies, presumably to avoid bolstering the claims made by MDL against Brian and Scott on the basis of such duties.

259 Mr Bedrossian points out, in closing submissions, that there is no evidence to support any claim for compensation by MSC in respect of the two crushers purchased by Scott through Stoneco. It is not necessary to address the question of quantification of any profits made by Stoneco in respect of the work done in South Australia, where I have not found that a breach of duty was established. The Robert Murdoch Interests relied on a valuation report of Mr Dupont in respect of the Braeside and Robertson's Knob quarries (Ex D5) and on Mr Cooper's report addressing resources and products from the Braeside and Robertson's Knob quarries. The Brian Murdoch Interests did not lead expert evidence in respect of those quarries. I do not consider it is necessary to address the expert evidence as to this issue, or any question of quantum in respect of the acquisition of the Braeside and Robertson's Knob quarries, where I have not found that the Robert Murdoch Interests' claim for breach in respect of the Braeside and Robertson's Knob quarries is established.

260 Robert and Stephen also cause MDL, WJM and MSC to plead (SOC [77]-[82)] a claim for breach of fiduciary duty against Brian, arising from his rejecting Robert's proposal to terminate salary payments to Scott where Scott was no longer providing services to those companies. Robert's evidence addresses payments made to Scott between 2011 and 2015 and the provision of a motor vehicle to Scott (Robert 20.11.17 [414]ff). Robert's evidence is that, although

he considers he could have terminated the payment of a salary to Scott, or terminated his employment, on the basis that director's approval to that course was not required, he did not do so. It seems to me that the position Brian took as to this issue was inappropriate, but did not amount to a breach of statutory and fiduciary duties where it did not have any consequence, since Robert considered he was free to terminate that payment without Brian's consent but chose not to do so. The claim against Brian and the claim against Scott for knowing receipt is not established.

**Brian's Oppression Proceedings**

261 By an Originating Process filed on 28 November 2016, Brian sought a declaration that the affairs of MDL have been and/or are being conducted in a manner that is contrary to the interests of MDL's members as a whole and/or in a manner that is oppressive to, unfairly prejudicial to, or unfairly discriminatory against Brian. Brian also sought declarations that specified matters were contrary to the interests of MDL's members as a whole and/or were oppressive to, unfairly prejudicial to, or unfairly discriminatory against Brian. Brian originally sought an order requiring Robert to sell his shares in MDL to Brian at fair value but abandoned that relief in final submissions, presumably because his own evidence was that he could not afford to buy those shares. I return to that matter below.

262 Brian now seeks the same relief in his oppression case that Robert has long sought in his winding up case, namely an order that MDL be wound up. It is plain that such an order should be made, on the straightforward basis that the relationship between Brian and Robert has irretrievably broken down, and I will return to that matter in respect of Robert's winding up application below. It follows that it is not strictly necessary to address Brian's oppression case, which does not lead to relief that would not already be ordered. I will nonetheless briefly address Robert's oppression claim so far as it may be of historical interest and relevant to costs.

*Claim in respect of the Cadia work*

263 The specific matters raised in this claim are pleaded in paragraphs 10-24 of Brian's Points of Claim ("POC"). Brian essentially repeats the allegation

brought in his derivative action that Robert omitted to cause MDL to take up and perform opportunities for remunerated work at the Cadia mine and generally CVO and for Cadia Holdings during the period from about 1 July 2011 and that Robert caused persons or entities related to or associated with him, including Stephen, RKM, CCS and BPPL, to take up and gain financial benefits from the Cadia mine work during that period. In closing submissions, Mr Kelly submits that the oppression alleged in respect of the Cadia mine is limited to the period commencing from 1 July 2011 and there was nothing "commercially unfair" about RKM or BPPL carrying out crushing and grinding work at the Cadia mine between 1 July 2011 and 30 June 2014, and also refers to Brian's suggested knowledge that such work was being done. I have addressed these matters above and my findings as to breach of Robert's and Stephen's fiduciary and statutory duties would also support a finding of oppression.

*Claim in respect of the "swamped" crushers*

264 Brian also contends that Robert omitted, in or about 2009, to acquire several flood-damaged (or "swamped") crushing machines for the benefit of MDL, but instead caused or permitted those machines to be acquired for the benefit of RKM. Brian contends that, in or about the financial year ending 30 June 2009, MDL acquired, or had the opportunity to acquire, ownership of the three swamped crushers (POC [25]); following the acquisition of the swamped crushers (or the initial opportunity to acquire them), Robert caused or permitted MDL to expend its own resources upon the repair and maintenance of the swamped crushers, while they were held in the MDL equipment yard at Mudgee (POC [26]); if (which it appears was not the case) MDL had acquired ownership of the swamped crushers, in or about 28 June 2010, Robert caused MDL to transfer or sell the swamped crushers to RKM that (POC [27]); the transfer or sale of the swamped crushers from MDL to RKM (which it appears did not occur) was not in MDL's interests, because MDL did not receive full market value for the swamped crushers; and/or, even if MDL did receive full market value for the swamped crushers, they were more valuable to MDL by being retained and utilised for the performance of quarrying work and/or for the

provision of paid quarrying work at quarry/mine sites owned by other parties, including the Cadia mine (POC [29]).

265 Brian in turn pleads that, in transferring the swamped crushers from MDL to RKM (or, alternatively, in failing to cause MDL to acquire them), Robert breached his fiduciary duties to MDL and his duties pursuant to sections 180-183 of the *Corporations Act* (POC [30]). Although that claim is not now pressed as a derivative claim, it may still be brought as an oppression claim. Brian in turn pleads (POC [31]) that the pleaded conduct of MDL's affairs and the pleaded acts or omissions by or on behalf of MDL were contrary to the interest of MDL's members as a whole and oppressive to, unfairly prejudicial to, and unfairly discriminatory against Brian in his capacity as a shareholder and give rise to an entitlement on the part of Brian to seek the relief that he sought in these proceedings. As I noted above, he has now abandoned the relief that he primarily sought and now seeks the same winding up order that Robert seeks.

266 In his first affidavit, Brian addresses the circumstances in which the three "swamped" crushers were made available for sale by a third party and acquired by RKM. His evidence is that he drew the availability of those machines to Robert's attention (Brian 6.7.17 [87]) and that Robert responded that he was not interested in acquiring those machines. I accept Brian's evidence in that regard. Brian also refers to Robert's and Stephen's subsequent inspection of those machines; to Robert having advised him that Stephen had purchased the swamp crushers and intended to re-sell them; and to his observing MDL staff working on the machines to repair them (Brian 8.7.17 [89]). In fact, the swamped crushers were purchased by RKM rather than by Stephen personally.

267 Robert accepted in cross-examination that, at least with hindsight, the acquisition of the swamped crushers by RKM was an extraordinarily successful transaction, by which RKM acquired three near new crushers for about $370,000 with a saving of close to $1 million from the new price (T289). As I noted above, one of those crushers, known as "Big Wings", was subsequently sold by RKM to MDL for about $340,000; Mr Murdoch accepted in cross-examination that he made the decision to buy that machine from RKM on

behalf of MDL (T292) as well as RKM's decision to sell that machine as vendor in the same transaction (T294); and, after MDL had acquired that crusher from RKM, Robert in turn caused it to make that crusher available to RKM or BPPL for them to fulfil their commitments with Cadia, rather than MDL directly performing that work (T294). Each of these decisions was tainted by conflict of duty and duty and duty and interest.

268 MDL's primary case alleging a transfer of the swamped crushers from MDL to RKM cannot succeed, because it appears this did not occur. However, I am inclined to think that Brian's alternative oppression claim based on MDL's failure to acquire the swamped crushers would have been established, if it were necessary to determine that claim. It seems to me that the purchase of the swamped crushers was within the scope of MDL's business, where MDL operated crushing machines; Brian had raised the possibility of acquisition of those machines with Robert; and MDL plainly had staff, or access to service providers, with the expertise to repair the damaged machines and the financial resources to acquire them. Robert's decision not to acquire those machines in MDL and to acquire them in RKM was made in circumstances of obvious conflict of interest where self-interest tainted any judgment that he made. This matter would have supported the oppression claim, if it were necessary to determine it.

*Claim in respect of the Timboon quarry*

269 Brian also repeats essentially the same claim in respect of the Timboon quarry as pleaded in MDL's derivative action. Mr Kelly responds, in closing submissions, that there is nothing "commercially unfair" in the acquisition of Timboon, contending that Brian had inspected the quarry and decided for himself that it was "speculative and not something he was interested in acquiring". I have addressed the issues as to Brian's evidence in that respect above. Had it been necessary to determine Brian's oppression claim, this aspect of the claim would not have succeeded for the same reasons that this aspect of MDL's derivative claim did not succeed, because the acquisition of that quarry was not within the scope of MDL's business.

*Claim in respect of Buckaroo Road property*

270 Next, Brian relies on an allegation that Robert omitted, in or about early November 2016, to cause MDL to acquire a property located at Buckaroo Lane or Buckaroo Road near Mudgee ("Buckaroo Road Property"), and contends that such an acquisition was within MDL's financial means and within its interests and that Robert caused or permitted or assisted a third party to purchase that property.

271 Brian contends (POC [43]) that, by about August or September 2016, the Buckaroo Road Property which was in close proximity to MDL's quarry property in Mudgee was available for sale and (POC [44]) that, at or about that same time, namely in about August or September 2016, or by no later than October 2016, Robert and Stephen knew about the availability or likely availability of that property for purchase. Brian contends (POC [45]) that the Buckaroo Road Property was an asset, the acquisition of which MDL had or would have had a "legitimate interest" in at that time and the acquisition of which would have been beneficial to MDL and (POC [46]) that neither Robert nor Stephen informed Brian, or otherwise separately and fully informed MDL, of the availability of the Buckaroo Road property for purchase. Brian also contends (POC [47]) that, by no later than 27 October 2016, Stephen had commenced, or had been requested by Robert (in his capacity as a director of MDL) and had agreed shortly to commence, employment as a senior manager at MDL.

272 Brian contends (POC [48]) that, by no later than about early November 2016, Robert and/or Stephen decided to take steps to acquire, whether in their own names or in the name of a corporate entity in which they had an ownership interest or over which they had control, the Buckaroo Road Property and (POC [49]), in or about early November 2016, Stephen attended a public auction of the Buckaroo Road Property for the purpose of bidding for and thus attempting to purchase that property; that (POC [50]) Robert knew that Stephen was intending to attend at and participate in the process of bidding at the auction of the Buckaroo Road Property; and that (POC [51]), in or about early 2016, Stephen, either in his own interests and/or on behalf of Robert or one of the corporate entities related to Stephen or Robert, successfully bid at the auction of the Buckaroo Road Property, executed and then exchanged a contract for the purchase of the property.

273 Brian contends (POC [52]) that, in taking any and all of the pleaded steps (and in failing to give MDL the opportunity to take, or failing to cause MDL to take, the pleaded steps, including by fully informing Brian, Robert breached his fiduciary duties to MDL and his duties to MDL pursuant to sections 180-183 of the *Corporations Act* and Stephen breached his fiduciary duties to MDL and his duties to MDL pursuant to sections 180-183 of the *Corporations Act* and his contractual duties to MDL; that (POC [53]), by reason of MDL not itself acquiring the Buckaroo Road Property, it has suffered loss and damage; and the pleaded conduct of MDL's affairs and the acts or omissions by or on behalf of MDL were contrary to the interest of the members as a whole of MDL and oppressive to, unfairly prejudicial to, and unfairly discriminatory against Brian in his capacity as a shareholder; and give rise to an entitlement on the part of Brian to seek the relief sought in these proceedings.

274 Turning to the affidavit evidence, Brian addressed the purchase of the Buckaroo Road Property and expressed the opinion that MDL should have purchased that property when it came onto the market, and his evidence is that he was not told that property became available for sale by either Robert or Stephen (Brian 6.7.17 [119]), and first became aware that it had been sold on market and purchased by Stephen after a public auction (Brian 6.7.17 [122]). I accept Brian's evidence as to when he became aware of the sale of the property. Robert's evidence also addresses the acquisition of the Buckaroo Road Property by Stephen, and his evidence was that he had never been inclined to purchase that property on behalf of MDL for several reasons (Robert 20.11.17 [551]). Robert was emphatic in cross-examination that, although MDL could have purchased the Buckaroo Road Property, there was no need for it to do so, including for use as a buffer area in respect of MDL's Buckaroo Road quarry (T365). Stephen's affidavit evidence also addresses the purchase of the Buckaroo Road Property (Stephen [564]ff).

275 The Brian Murdoch Interests did not tender a report of Mr Hocking dealing with this claim, but tendered aspects of the joint expert report of Mr Hocking and Mr Cooper, reflecting the views of Mr Cooper, subject to a limiting order under s 136 of the *Evidence Act* (Ex P4). The joint report refers to MDL's operation of the Buckaroo Road quarry and associated processing facilities and to an

associated mining lease, and noted that the mining licence area and main processing plant site are separated by land held by outside parties, so that the delivery of material from the extraction area to the processing plant depends upon those parties' continued consent. The joint report also refers to the circumstances of the sale of the Buckaroo Road Property. The parts of the joint report which were tendered, in respect of Mr Cooper's view, noted his agreement that, if current arrangements for internal access between MDL's extraction pits and MDL's Buckaroo Road processing plant were not available in the future, then the use of an alternative access route by Buckaroo Road would trigger a change to the mine operating plan and likely a planning approval requirement through the local council; and haulage vehicles used by MDL would then need to be road registered. Mr Cooper also agreed that MDL's blasting activities were regulated by reference to disturbance criteria, including ground vibration and air blast over-pressure and not merely by physical distance. Mr Cooper accepted that the continued availability of access was important to the operation of MDL's Buckaroo Road quarry, although it was unclear from the joint report which access was referred to, and he did not agree that the operations of that quarry would necessarily become unviable if other access arrangements were no longer possible but approval to cart quarried materials in road registered trucks was obtained.

276 In any event, Mr Cooper made the more fundamental point that that same situation would exist, in respect of gaining approvals, whether access to Buckaroo Road was from lot 103 or lot 153, with the implication that the acquisition of the Buckaroo Road Property would not improve MDL's position in that respect. Mr Cooper also pointed out, cogently in my view, that the acquisition of a single property would make only a marginal difference to the risk of any objections to MDL using road access to transport limestone and dolomite, where other properties in the area would be impacted by any increased heavy traffic movements on Buckaroo Road. It seems to me that, so far as the Brian Murdoch Interests sought to establish, by the tender of the joint report, that the acquisition of the Buckaroo Road Property was necessary to secure an alternative means of access between MDL's Buckaroo Road quarry

and MBL's production plant, by road access through Buckaroo Road, that proposition is not established.

277 The Robert Murdoch Interests in turn tendered Mr Cooper's report dated 30 January 2020 dealing with the acquisition of the Buckaroo Road Property (Ex D7). Mr Cooper there noted that one of four land parcels already owned by MDL as freehold had partial direct frontage and access rights to Buckaroo Road. Mr Cooper addressed issues as to the potential expansion of MDL's Buckaroo Road quarry, the current working life of that quarry, investigations as to the expansion of that quarry and the costs of an assessment as to the expansion of that quarry, which do not appear to be raised by any evidence on which the Brian Murdoch Interests now rely. Mr Cooper also addressed the question of road access to current and future quarrying operations on the site, which is addressed by that part of the joint report which is now tendered by the Brian Murdoch Interests, to which I referred above.

278 Mr Cooper also addressed the question of a buffer zone for drilling and blasting activities and concluded that there would be little material benefit to MDL in acquiring the Buckaroo Road Property to provide a further buffer zone, for several reasons, including that there was already a sufficient buffer distance within MDL's current land holding and that the utility of any increase in the buffer zone would be reduced by the fact the landholdings would not be contiguous and continuous. Mr Cooper also expressed the view that MDL already had legal access from its land holdings to Buckaroo Road, or the Buckaroo Road crown road reserve, and there was little material benefit in MDL acquiring the Buckaroo Road Property against the contingency that internal haul road arrangements would be terminated. Mr Cooper also noted that the acquisition of that property was not necessary to address the distance between quarry operations and the residence and buildings on that property, which was "comfortable" in the context of typical hard rock quarry operations. I accept Mr Cooper's evidence as to these matters, in his initial report and as confirmed by the joint report, and it does not seem to me that the joint report assists the Brian Murdoch Interests in respect of this claim.

279 Had it been necessary to determine Brian's oppression claim, I would not have been persuaded by the evidence to which I have referred that the purchase of the Buckaroo Road Property as a "buffer" for the quarry or to provide an alternate means of access would have been of any real advantage to MDL or that the purchase of residential properties was generally within the scope of MDL's business; the opportunity to purchase that property did not come to Robert or Stephen as a director, officer or employee of MDL; and I am not persuaded that MDL suffered any loss by not acquiring that property. I am not persuaded that there was anything oppressive about Robert or Stephen (or, for that matter, Brian) not causing MDL to acquire that property. This claim would not have supported Brian's oppression claim, had it been necessary to determine that claim.

*Claim in respect of the "MDL Crushing" name*

280 Brian also alleges that Robert caused or permitted RKM to register and use the business name "MDL Crushing". Brian contends (POC [70]) that MDL had developed and held a reputation and had become known by reference to the description "MDL"; that (POC [71]) MDL, by a meeting of its directors, had not licenced, authorised or permitted RKM or any other company in which neither MDL itself nor Brian have a direct ownership interest, to use the name "MDL" in its business or commercial activities; that (POC [71]) Robert caused or allowed RKM to register and use, for its own commercial purposes, the business name and the description "MDL Crushing" and did so without MDL's authorisation and without informing Brian; that (POC [72]) Robert thereby caused or permitted a separate corporate entity to derive a direct or indirect commercial benefit by purporting to have an association with MDL which it did not have; and (POC [73]) that conduct was contrary to the interest of MDL's members as a whole and oppressive to, unfairly prejudicial to, and unfairly discriminatory against Brian in his capacity as a shareholder; and gives rise to an entitlement on the part of Brian Murdoch to seek the relief sought in these proceedings.

281 RKM registered the business name "MDL Crushing" from 13 October 2011 (Ex J1, B1496). Robert's first affidavit addresses (Robert 20.11.17 [546]ff) the acquisition of the "MDL Crushing" business name, without providing any real

explanation of that acquisition. Robert's evidence in cross-examination was that he registered the "MDL Crushing" name as a "tit for tat" response to Scott's use of the name "Stoneco". He acknowledged that MDL's accountant, Mr Portelli, had (rightly) advised him that registering that name was not a good idea but expressed the view that Mr Portelli should have given that advice more firmly (T366). It seems to me that Robert likely realised that the name "MDL Crushing" could be used for work undertaken by RKM and BPPL in the same field as MDL and that firm was in fact used for invoices issued by those companies for work done at the Cadia mine (T365-366). I recognise that Robert denied that he registered "MDL Crushing" as a business name as part of a plan to divert revenue and opportunities in relation to Cadia work away from MDL (T368); while that evidence may have been correct as a matter of subjective motivation, it seems to me that the use of that name in respect of the Cadia mine had that effect.

282 In closing submissions, Mr Kelly submits that (as Robert had said in his evidence noted above) RKM had registered the name "MDL Crushing" in response to Scott having caused his company to change its name to Stoneco Pty Ltd, which was similar to the name of MSC, "Mudgee Stone Co Pty Ltd" and that "[t]hat sort of tit for tat behaviour by parties in dispute does not rise high enough" to constitute oppression. If it were necessary to determine Brian's oppression claim, I would have held that this conduct, exacerbated by the use of that name in work at the Cadia mine, amounted to oppression although it would not, without more, have warranted the relief previously sought by Brian and now abandoned.

*Acquisition of New Zealand land for quarrying*

283 Brian also relies on Robert's omitting, in or about 2009, to cause MDL to acquire land in New Zealand which was suitable for a limestone quarry for the benefit of the MDL, and later causing or permitting that land to be acquired by persons or entities related to or associated with him. In opening submissions, Mr Bedrossian describes this claim as directed to the diversion of a corporate opportunity away from MDL by RKMNZ's acquiring the New Zealand land for use as a limestone quarry. Mr Kelly submits that Brian's evidence indicates that

he rejected this land as a possible investment for MDL and was happy for Stephen to take it up, and that there is nothing commercially unfair about RKM or RKM NZ buying that land to develop it as a quarry after Brian had rejected it as an investment for MDL.

284 Again, the essential premise of this claim is that this opportunity was within the scope of MDL's business. I have referred above to Robert's and Brian's evidence of their trip to New Zealand in 2009 to investigate the possible purchase of a quarry by the Murdoch Group, and as to their inspection of the Spring Junction land in the course of that trip. There is no evidence that any substantial consideration was then given to purchasing this land within MDL or within other companies in the Murdoch Group or by Brian and Robert personally, prior to the subsequent decision by Robert and Stephen to pursue that property.

285 Had it been necessary to determine Brian's oppression claim, I would not have been persuaded that the purchase of the New Zealand land was within the scope of MDL's business. I have referred above to the fact that interests in other quarries were purchased by Brian and Robert personally as well as by other companies in the Murdoch Group. I would not have found that Robert's later decision to acquire this land in RKMNZ, rather than revisiting the question whether it should be acquired by MDL, or another company within the Murdoch Group, or Robert and Brian personally, was sufficient to establish the oppression claim.

*Payment of Stephen's remuneration*

286 Brian also relies on an allegation that Robert caused or permitted Stephen to be paid remuneration by MDL in excess of that which ought reasonably have been due to Stephen. In opening, Mr Bedrossian addressed that claim only briefly, referring to the fact that the remuneration paid to Stephen included $72,500 on account of "holiday pay", which was paid without consultation with Brian. In closing submissions, Mr Bedrossian accepted that the Court did not need to address the claim in respect of Stephen's remuneration and, given the paucity of evidence and the absence of submissions, I do not propose to do so.

*Provision of information to Brian*

287 Brian also contends that Robert excluded Brian from obtaining timely and accurate information and making decisions in respect of MDL's operations. I do not consider it necessary to address the claim for exclusion from information and decision-making, where it is plain that the basis of a winding up is established on other grounds.

*The relief sought by Brian in the oppression claim*

288 As I noted above, Brian, up to the point of closing submissions, sought an order under s 233 of the *Corporations Act* that Robert sell the entirety of his shareholding in MDL to Brian at fair value and that Robert resign as a director of MDL.

289 I should refer to Brian's evidence in cross-examination, which undermined that claim for relief, before turning to the position that he now adopts. It was apparent in cross-examination that Brian did not have a clear understanding of the nature of the "oppression" claim that he had brought, although he understood that he was in Court because he felt he was "being robbed" and had called in accountants to review the documents and he believed that he had not received his share of "the money that was supposed to be made". He also did not have a clear understanding that the relief he had sought in the oppression proceedings was that Robert sell his shareholding in MDL to him, and he volunteered that an alternative to such a sale was that Robert "corrects what he's done" (T103). Brian's evidence in cross-examination also undermined any suggestion that he could afford to acquire Robert's shares if the order that he then sought was made. When asked in cross-examination whether he expected to pay fair value for Robert's shareholding in MDL, he observed that that "depends how much it is" and that "[t]here's not that much money floating around at this present time" (T103). When it was put to Brian that, at the time the proceedings were commenced, MDL was worth about $12 million and the cost of acquiring Robert's shares would be about $6 million, he responded:

> "I wouldn't be able to do that, I haven't got that sort of money." (T106)

He later again accepted that the present position was that he did not have the money to buy out Robert's share in MDL (T108).

290 Brian also accepted, in cross-examination, that he would like MDL to be wound up and for a final account to be taken and for him and Robert each to get a half share (T106) although that was contrary to the relief he then sought in the oppression proceedings and consistent with the relief then sought by Robert in the winding up proceedings. At the same time, he gave somewhat inconsistent evidence which contemplated that MDL would not be wound up and that, while he would like his share in the value of the company to come to him, he would also "like some control in how the company is run" and that he would be happier if he had "more involvement" (T107). He then gave evidence, in cross-examination, that appeared to be inconsistent with his earlier answers in respect of a winding up, that splitting up and distributing the assets of MDL would take away its operating capability and it would become worth "hardly anything" (T108). That assessment is likely to be incorrect, given the intrinsic value of MDL's assets and the assets of associated companies. Later in his cross-examination, Brian treated the suggestion of a winding up as a threat made by Robert to "frighten" him out of the Court proceedings, and said that he did not think that Robert would consider winding up a family company (T226). That evidence is inconsistent with the relief that he now seeks in closing submissions.

291 In closing submissions, Brian no longer sought an order that Robert sell his shares in MDL to him, which, as I noted above, could not properly have been made where Brian's evidence in cross-examination was that he could not afford to purchase those shares. The relief now sought by both Robert and Brian, by way of a winding up order, can readily be made, without determination of Brian's oppression claim, by reason of the breakdown of their relationship.

**Robert's winding up application**

292 By Originating Process filed on 9 September 2016, Robert seeks an order under s 461(1)(k) of the *Corporations Act* winding up MDL on the grounds that it is just and equitable and in the interests of the members as a whole.

293 At least where a company was established on the basis of relationships of mutual confidence, a winding up order may be made on the just and equitable

basis under s 461(1)(k) of the *Corporations Act* where irreconcilable differences emerge between its members: *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* above at [89]; *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343; [2009] NSWSC 342 at [97]–[98]. The Court may make a winding up order on that basis in circumstances that do not amount to oppression, although a person who is responsible for the breakdown of the relationship is less likely to be afforded relief: *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* above; *Nassar v Innovative Precasters Group Pty Ltd* above at [90], [96], [117]. I have also summarised the applicable principles in *Re AJ Roberts Removals and Storage Pty Ltd* [2017] NSWSC 1054 and *Re Pure Nature Sydney Pty Ltd* [2018] NSWSC 914. A winding up is a characteristic remedy in circumstances that a working relationship predicated on mutual cooperation, trust and confidence has broken down, and that there is no absolute rule that the Court will not wind up a solvent company, although winding up is a last resort: *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325 at [119]; *Re Pure Nature Sydney Pty Ltd* above at [76]; *Asia Pacific Joint Mining v Allways Resources Holdings Pty Ltd* (2018) 125 ACSR 227; [2018] QCA 048 at [52]. I bear in mind that s 467(4) of the *Corporations Act* applies where a winding up order is sought on the just and equitable ground, and I must have regard to the matters identified in that section, including the availability of some other remedy and whether the applicant is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

294 A number of factors plainly support a winding up on the just and equitable ground. First, it is plain that the Murdoch Group Companies, including MDL, were formed on the basis of the personal relationship between Brian and Robert based on mutual trust and confidence, and were conducted by them as a family business on that basis. Second, it is plain that the relationship between the parties has failed, and the length and range of issues in this litigation plainly demonstrates that matter. Third, board meetings were historically not conducted in a formal manner in MDL and, since the dispute has arisen, Brian is not prepared to attend board meetings which Robert has sought to convene. There are obvious difficulties in either now managing the business in an

informal way or conducting board meetings of MDL, and there is deadlock at shareholder and board level in MDL, where only two shares have been issued and Brian and Robert each hold one share. As a result of the distrust between the parties, Brian is presently unwilling to sign financial accounts for MDL.

295 Brian previously opposed the winding up application on grounds set out in his Grounds of Opposition to Winding Up dated 3 February 2017. Those Grounds of Opposition are no longer pressed, where Brian now supports a winding-up, but I will address them briefly for completeness. Brian then contended (Grounds of Opposition [1]) that Robert has failed to establish facts or circumstances, which individually or cumulatively render it just or equitable, for the purposes of s 461(1)(k) of the *Corporations Act*, for MDL to be wound up. I am not persuaded by that contention and it is inconsistent with the relief which Brian now also seeks. Brian has also himself established matters which would make it just and equitable for MDL to be wound up, unless alternative relief were possible. Brian no longer seeks such alternative relief, and Robert has established a breakdown in the relationship between the parties that would warrant winding up unless any other order could be made.

296 Brian also then contended (Grounds of Opposition [2]) that, for the purposes of s 467(4) of the *Act* and also as a general ground of opposition to the contention that it is just and equitable that MDL be wound up, Robert had and continues to have available to him at least one other remedy, other than the winding up of MDL, and Robert had acted and continues to act unreasonably in seeking to have the company wound up instead of pursuing those other remedies. Brian then contended that the other available remedies comprised both the offers made by Brian to acquire the Robert's shareholding in MDL and Brian's ability, in the Oppression Proceedings, to consent to Court orders requiring the sale of Robert's shares in MDL to Brian. Obviously, this contention cannot be sustained, where Brian accepted in cross-examination that he could not fund the acquisition of those shares and is inconsistent with Brian's now seeking an order that MDL be wound up.

297 Third, Brian then contended (Grounds of Opposition [3]) that it was not just and equitable for MDL to be wound up in reliance upon the matters on which Brian

relied by reason of the matters raised in the other proceedings and the suggestion that the determination of the other proceedings would establish that Brian was justified in his concerns and complaints regarding Robert's conduct in respect of MDL and that conduct was unreasonable and caused the circumstances upon which he now relies in seeking a winding up order. While I accept that proposition in part, it would not displace the need for a winding up where the relationship between the directors and shareholders has irretrievably broken down and no feasible alternative to a winding up has been identified. Brian also then contended (Grounds of Opposition [4]) that, in the other proceedings, it would be established that Robert's conduct rendered it unjust and inequitable, including in the circumstances of opportunities to sell to Brian his shareholding in MDL, that MDL be wound up on Robert's application. I cannot accept that contention, where an alternative to winding up is not established and, of MDL were not wound up on Robert's application it would need to be wound up as to the only just and equitable order in the oppression proceedings brought by Brian.

298 I recognise that a winding up of MDL could give rise to detriment to either shareholder, if the assets or business of MDL was sold by a liquidator to the other shareholder, other family members or their associated companies without a full sale process or in a manner that did not maximise the sale proceeds. In order to mitigate that risk, I have in mind appointing a liquidator from a national firm who will have the resources to conduct a national sale campaign in respect of the business if appropriate. Second, although the form of the sale process to be adopted is a commercial decision for the liquidator, it seems to me that a well-advised liquidator who is conscious of the significant risks in a related party sale may well seek a direction from the Court as to the appropriateness of any such sale, at least of MDL's main undertaking (in the sense used in the case law) or any major assets.

299 The Robert Murdoch Interests submit that the appropriate order is for the Court to wind up MDL but defer making that order for a period in which the parties may consider their position with the benefit of the Court's judgment and have a further opportunity to resolve their differences. The Brian Murdoch Interests also raised, in closing submissions, the possibility that a winding up order

should be stayed for a short period, to allow the parties to consider any steps which might be taken upon the delivery of a judgment without the immediate intervention of a winding up order. The parties have had a long period in which to resolve the proceedings between themselves and have not done so. Nonetheless, I will stay the winding up order for a further two weeks after orders are made, consistent with the approach commonly taken in cases of this kind, to allow the parties a further opportunity to resolve these issues by agreement between themselves.

**Costs**

300 Subject to hearing from the parties, each of them has had only partial success, and my preliminary view is that there would be no order as to the costs of the proceedings.

301 I direct the parties to bring in agreed short minutes of order to give effect to this judgment, including as to costs, within 14 days or, if there is no agreement, their respective draft short minutes of order and short submissions as to the differences between them.

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